No. 14078

United States
Court of Appeals
For the Ninth Circuit.

WEST COAST PRODUCTS CORPORATION,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—C129-3R

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

ALBERT PICARD, ESQ.,
405 Montgomery Street,
San Francisco, California,

For Appellant.

A. T. SUTER, ESQ.,

F. E. FUHRMAN, ESQ.,

65 Market Street,
San Francisco 5, California,

For Appellee.

EXCERPTS FROM CIVIL DOCKET ENTRIES

1950

May 4—Filed proceedings transferred from Northern Division.

Oct. 31—Filed answer, with demand for jury.

1952

Mar. 12—Filed motion by plaintiff for summary judgment.

Aug. 25—Ordered motion for summary judgment denied.

1953

Mar. 24—Filed request by plaintiff for admissions.

Apr. 28—Filed admissions by defendant to request by plaintiff.

May 11—Jury trial. Jury impaneled. The Court held that no question of fact for jury to decide, and on stipulation, case submitted to the Court on briefs. Jury discharged.

May 26—Filed motion by defendant to set aside submission and reopen trial.

June 5—Ordered motion to set aside submission denied.

July 10—Filed order for judgment in favor of plaintiff.

July 23—Filed findings of fact and conclusions of law.

July 23—Filed Judgment for plaintiff vs. defendant in sum of $1,519.77, with interest at 6% and costs.

1953

July 24—Entered judgment.
Aug. 1—Filed motion for new trial.
Aug. 7—Filed order denying motion for new trial.
Sept. 3—Filed notice of appeal by defendant.
Sept. 4—Filed appeal bond in sum of $250.00.
Sept. 30—Filed reporter's transcript of proceedings of May 11, 1953.

In the District Court of the United States in and for the Northern District of California, Northern Division

No. 6302

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

COMPLAINT FOR FREIGHT CHARGES

Plaintiff complains of defendant and for cause of action alleges:

I.

This action arises under a law of the United States regulating interstate commerce in that it arises under Section 6(7) and other sections of Part I of the Interstate Commerce Act of which this court has jurisdiction under Title 28, United States Code, Section 41, Subdivision (8);

II.

Plaintiff is now and was during all of the times hereinafter mentioned a corporation duly created, organized and existing under the laws of the State of Delaware, authorized to do and doing business in the State of California and elsewhere and, as such corporation, was during all of said times engaged as a common carrier by railroad in the transportation of persons and property for hire in interstate commerce over its lines and in participation with other common carriers by railroad in and through various states of the United States;

III.

That defendant, West Coast Products Corp., is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California and having its principal place of business in the City of Orland, County of Glenn, State of California;

IV.

That within two years last past defendant became and is now indebted to plaintiff in the sum of $1,475.51 as and for undercharges on various shipments of salt cured olives transported by plaintiff and its connecting carriers at the special instance and request of defendant from Orland, California, consigned to and delivered at various Eastern destinations, as evidenced by statement attached hereto, marked Exhibit A and made a part hereof, and to which reference is hereby made; that the transpor-

tation charges due on account of the transportation of said shipments, as aforesaid, in accordance with and pursuant to plaintiff's tariffs at all times herein mentioned duly posted, published and on file with the Interstate Commerce Commission, were the sum of $5,447.64, no part of which has been paid except the sum of $3,972.13; that plaintiff and its connecting carriers have duly performed each and every act on their part to be performed; that although demand has been made upon defendant for said charges, payment has been refused, and there is now due, owing and unpaid from the defendant to the plaintiff herein the sum of $1,475.51;

V.

That by reason of certain applicable provisions of the Internal Revenue Act there have accrued on account of said transportation charges aforementioned taxes due to the United States of America in the sum of $44.26, which by law the plaintiff is required to collect and pay over to the United States.

Wherefore, plaintiff prays judgment against the defendant in the sum of $1,475.51 with interest thereon, and in the further sum of $44.26 on account of Federal transportation taxes, for its costs of suit, and for such other and further relief as to the court may seem just and proper.

DEVLIN & DEVLIN &
DIEPENBROCK,

/s/ A. T. SUTER,
Attorneys for Plaintiff.

EXHIBIT A

UNCOLLECTED FREIGHT CHARGES

YUF 1548

Debtor: West Coast Products Co.

From	To	F/B No.	Waybill No.	Waybill Date	Int.	Car No.	Commodity	Weight	Tariff Charges	Freight Bill No.	Amount Collected	Balance Due
Orland, Calif.	New York, N.Y	SP 12	SP 12	Mar. 8, 1948	Penn	104387	Olives	61080	1304.66		938.18	366.48
"	"	SP 20	SP 20	Mar. 17, 1948	Wab	86233	"	61440	1312.36		943.72	368.64
"	Cleveland, Ohio	SP 38	SP 38	April 6, 1949	TNO	59444	"	71208	1403.82		1061.37	342.45
"	Buffalo, N.Y.	SP 39	SP 39	April 7, 1949	SP	81989	"	60000	1426.80		1028.86	397.94
									5447.64		3972.13	1475.51
											Tax	44.26
												1519.77

[Endorsed]: Filed March 20, 1950.

[Title of District Court and Cause.]

MOTION TO DISMISS PRESENTING DEFENSE OF FAILURE TO STATE A CLAIM

The defendant herein moves the above-entitled Court to dismiss the above-entitled action because the complaint fails to state a claim against said defendant upon which relief can be granted.

/s/ ALBERT PICARD,
Attorney for Defendant.

NOTICE OF HEARING MOTION

To: Messrs. Devlin & Devlin & Diepenbrock,
Attorneys for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at its Courtroom in the United States Post Office Building, City of Sacramento, County of Sacramento, State of California, on Monday, the 24th day of April, 1950, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated: April 12, 1950.

/s/ ALBERT PICARD,
Attorney for Defendant.

Authority:

Rule 12(b) of the Rules of Civil Procedure for the United States District Courts.

[Endorsed]: Filed April 13, 1950.

[Title of District Court and Cause.]

MOTION FOR CHANGE OF VENUE UNDER RULE 12(b) OF THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURT

The defendant herein moves the above-entitled Court to transfer the above-entitled action to the District Court of the United States for the Northern District of California, Southern Division, from the Northern Division of said Court and District on the ground that the defendant is a corporation incorporated under the laws of the State of California with its principal place of business and office in the City and County of San Francisco, State of California, which said City and County is located in the Southern Division of the Northern District of California, and is the proper place for the trial of an action against an inhabitant of the said City and County of San Francisco, in said Southern Division.

/s/ ALBERT PICARD,
Attorney for Defendant.

NOTICE OF HEARING MOTION

To: Messrs. Devlin & Devlin & Diepenbrock,
Attorneys for Plaintiff.

Please take notice that the undersigned will bring the above motion on for hearing before this Court at its Courtroom in the United States Post Office Building, City of Sacramento, County of Sacra-

mento, State of California, on Monday, the 24th day of April, 1950, at 10:00 o'clock a.m. or as soon thereafter as counsel can be heard.

Dated: April 12, 1950.

/s/ ALBERT PICARD,
Attorney for Defendant.

Authorities:

Sanders vs. Royal Indemnity Co., Inc., 33 Fed. (2d) 512; Title 28, Sec. 114, Federal Code Annotated.

[Endorsed]: Filed April 13, 1950.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Monday, the 24th day of April, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Dal M. Lemmon,
District Judge.

[Title of Cause.]

MINUTES OF APRIL 24, 1950

After hearing Horace B. Wulff, Esq., it is Ordered that the motion for change of venue be submitted and the other motions be held in abeyance until decision is made on change of venue.

Certified true copy.

At a stated term of the Northern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City of Sacramento, on Tuesday, the 2nd day of May, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Dal M. Lemmon,
District Judge.

[Title of Cause.]

MINUTES OF MAY 2, 1950

These cases having heretofore been submitted on motion for change of venue under Rule 12 (b), it is Ordered that they be transferred to the Southern Division of the Northern District of California for trial, and continuing generally all motions, other than the motion to transfer, to the Southern Division.

Certified true copy.

[Title of District Court and Cause.]

ANSWER

Defendant for answer to the complaint on file herein:

I.

Denies that defendant has its principal place of business in the City of Orland, County of Glenn, State of California, and in that behalf alleges that said defendant has its principal place of business in the City and County of San Francisco, State of California.

II.

Answering paragraph IV of said complaint said defendant admits that it caused plaintiff to transport olives but denies that the olives were salt-cured, and in that behalf alleges that the olives transported by plaintiff for defendant were oil-coated olives, and, except as herein admitted, denies each and every allegation contained in paragraph IV of said complaint, and in that behalf said defendant denies that there is any sum whatsoever due or owing or unpaid from it to plaintiff and alleges that the sums paid to said plaintiff were the full sums due and payable to said plaintiff for the shipments referred to in said complaint and that plaintiff has been fully paid.

III.

Denies each and every allegation contained in paragraph V of said complaint and in that behalf alleges that if any amount is due to the United States of America for taxes the obligation to pay the same is upon plaintiff and not upon this answering defendant.

Wherefore, said defendant prays that plaintiff take nothing by this action and that it have judgment against said plaintiff for its costs of suit incurred herein.

/s/ ALBERT PICARD,
Attorney for Defendant.

State of California,
City and County of San Francisco—ss.

Albert Picard, being first duly sworn, deposes and says:

That he is the President of West Coast Products Corporation, the defendant named in the foregoing Answer, and makes this verification for and on behalf of said corporation; that he has read said answer and knows the contents thereof, and that the same is true except as to matters which are therein stated upon information or belief and that as to those matters he believes it to be true.

/s/ ALBERT PICARD.

Subscribed and sworn to before me this 30th day of October, 1950.

[Seal] /s/ CHILMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

Defendant hereby demands a trial by jury of the above-entitled action.

/s/ ALBERT PICARD,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 31, 1950.

[Title of District Court and Cause.]

PLAINTIFF'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

To the Above-named Defendant and to Albert Picard, Attorney for Said Defendant:

You, and each of you, are hereby notified that on Monday, the 24th day of March, 1952, at the Courtroom of the above-entitled Court in the United States Post Office Building, Seventh and Mission Streets, San Francisco, California, the above-named plaintiff will present to the Court its motion for the entry of Summary Judgment in its favor in this cause.

Said motion for Summary Judgment will be based upon the provisions of Rule 56 of the Federal Rules of Civil Procedure; upon all the papers, files and pleadings in this action; upon the Affidavits of Emmet Murray and E. J. Swanson, copies of which are attached to this notice and herewith served upon you; and in particular upon each and all of the grounds specified in plaintiff's Memorandum of Points and Authorities in support of said motion, a copy of which is also attached hereto and herewith served upon you.

Dated at San Francisco, California, March 12, 1952.

/s/ A. T. SUTER,
Attorney for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT OF EMMET MURRAY

State of California,
City and County of San Francisco—ss.

Emmet Murray being duly sworn, deposes and says:

I am a citizen of the United States and of the State of California, residing in Alameda County, California. My office headquarters are 65 Market Street, San Francisco.

I have been employed by Southern Pacific Company in various capacities for more than 31 years. My present position is Chief Clerk, Revising Bureau in the Office of Auditor of Freight Accounts at San Francisco, California. I have been employed in the present capacity for the past 4 years. My duties in the said employment for Southern Pacific Company include the supervision of and checking various waybills covering shipments made over the lines of Southern Pacific Company and its connecting carriers for the purpose of ascertaining whether freight charges have been assessed and collected on such shipments in accordance with applicable tariff provisions. In the performance of my duties it is necessary that I be, and I am, familiar with the tariffs of Southern Pacific Company and its connecting carriers lawfully on file with the Interstate Commerce Commission.

In the course of my duties I became and I am familiar with the circumstances surrounding the assessment of freight charges on four carload shipments of olives which were tendered by West Coast Products Company to Southern Pacific Company during March, 1948, and April, 1949, at Orland, California for transportation from that point via Southern Pacific Company and its connecting carriers to various eastern destinations. The four shipments referred to are listed in the statement attached hereto and marked Exhibit "A." Photostat copies of shipping orders issued by Freight Agent of Southern Pacific Company at Orland, California covering the said four shipments are attached hereto and marked Exhibits B-1, B-2, B-3 and B-4.

Freight charges covering each of the four shipments were prepaid by West Coast Products Company in the amounts indicated in column 8 under the heading "Amount Collected" of the statement attached hereto and marked Exhibit "A." The said freight charges were computed on the basis of a base rate, plus supplemental increases, dependent upon destination of a shipment, which was provided in Item 3800 of Trans-Continental Freight Bureau East-bound Tariff No. 3-S for commodities described as follows:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

This rate is referred to and commonly known as the "Canned Goods Rate."

Photostatic copies of the Title Page of said tariff together with photostatic copies of pages thereof containing the base rate applicable to the above-quoted tariff provision are attached hereto and marked Exhibit "C."

After transportation of the said shipments was completed and the shipments delivered to consignees at final destination a report was furnished to the office of the Auditor of Freight Accounts of Southern Pacific Company by the Trans-Continental Freight Bureau reading as follows:

"We have report with respect to movement of Olives forwarded by Musco Olive Products Co., Orland, California, that contents in all shipments which they described as 'Black Olives' previously had been entirely cured in brine. The Olives later removed from the brine and allowed to fully dry. At time of putting the Olives in containers for shipment, they were coated with Olive Oil resulting in no other liquid or preservative in the containers except that which drained off the Olives.

"A similar movement of shipments which originated with the West Coast Products Corporation, Orland, California, also obtained and those contents which shippers described as Oil Cured or Oil Coated were likewise Black Olives which had been cured by first placing in a strong brine solution then removed and packed in wet salt for a few days and later placed in the brine solution again. When the salt had penetrated to pits of Olives they were removed from the brine and allowed to fully dry. At the time of placing in shipping containers, Olives were coated with Olive Oil giving them a

glossy appearance and preventing their further drying out. The only liquid in containers was that which drained from the Olives."

Based upon the foregoing report it was concluded that the four shipments of olives did not come within the description of the commodity referred to in Item 3800 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S quoted herein, as the olives described as "Oil Coated Olives" were not "Canned or preserved in juice or in syrup or liquid other than alcoholic," and it was therefore not proper to apply the rate or rates provided in that tariff item to compute the lawful tariff charges.

It was concluded that the olives in the said shipments described as "Oil Coated Olives" were salt cured olives which were not preserved in any liquid and that it was necessary and proper to apply to such salt cured olives the base rates plus supplemental increases, provided in Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S which are applicable to shipments described as:

"Olives, salt cured, not preserved in liquid, in water proof barrels, boxes, kits or pails."

Photostatic copy of tariff page containing the base rates applicable to the above tariff descriptions is attached hereto and marked Exhibit "D."

Application of such rates resulted in an increase in the lawful tariff charges on each of the four shipments referred to herein to the amounts indicated in Column 7 under the heading "Tariff Charges" in the statement attached hereto and marked Exhibit "A."

As indicated in Column 9 under the heading of "Balance Due" in the statement attached hereto and marked Exhibit "A," the additional freight charges computed in the manner set forth herein total the sum of One Thousand Four Hundred Seventy-five and 51/100 Dollars ($1,475.51) plus federal transportation tax in the sum of Forty-four and 26/100 Dollars ($44.26), a total of One Thousand Five Hundred Nineteen and 77/100 Dollars ($1,519.77).

Demand has been made upon the West Coast Products Co., the shipper of the said shipments for payment of said additional freight charges and federal transportation tax in the sum of One Thousand Five Hundred Nineteen and 77/100 Dollars ($1,519.77), but payment has not been received and the latter sum is now outstanding in the accounts of the Auditor of Freight Accounts of Southern Pacific Company.

/s/ EMMET MURRAY.

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] /s/ RUTH W. GEORGE,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT A

[Exhibit A attached is identical to Exhibit A attached to the Complaint. See page 7 of this printed record.]

Exhibit B-1

(For Use in Connection with Uniform Domestic Straight B/L of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classifications, effective March 15, 1932, as amended August 1, 1938, and June 15, 1940.)

7-4 .0M Sets ®

TH. SHIPPING ORDER

must be legibly filled in, ink, indelible pencil, or in carbon and retained by the Agent.

S-1553
2nd SHEET

SOUTHERN PACIFIC LINES
SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No. _____
Agent's No. 4P12

RECEIVE, subject to the classifications and tariffs in effect on the date of the Issue of this Shipping Order.

At ORLAND, Calif., MARCH 8, 1948.

From WEST COAST PRODUCTS CORPORATION, ORLAND, Calif.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination. If on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to TRANS-OCEANIC SALES CO., 6 HARRISON STREET, (Name or street address of consignee—For purposes of notification only.)

Destination NEW YORK CITY State of NEW YORK County of _____

Route SP UP CANW ERIE TO HATT & WASHINGTON STREETS, NEW YORK, N.Y.

Delivering Carrier _____ Car Initial PA Car No. 104387

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Depot ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
540	KEGS OILCOATED OLIVES	60,480 lbs.		
	53 kegs STANDARD size			
	80 " MEDIUM "			
	243 " LARGE "			
	100 " EXTRA-LARGE "			
	64 " MAMMOTH "			
	540 kegs			
	DUNNAGE	600 "		
		61,080 lbs.		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $ _____ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per _____

(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$ _____

Collect On Delivery $ _____ **For Account Of And Remit To** _____

Street, _____ City, _____ State _____

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

WEST COAST PRODUCTS CORPORATION, Shipper.

Per H. H. Jackson

2

Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

8-48

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

Parker

Exhibit B-2

1-46-1M Issued in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Illinois, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1939, and June 15, 1941.) S-1553

THIS SHIPPING ORDER must be legibly filled in, in ink or indelible pencil, or to carbon and retained by Agent. 2nd SHEET.

SOUTHERN PACIFIC LINES

SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. 5820

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At Orland, Calif., March 17, 1947.

From WEST COAST PRODUCTS CORPORATION, ORLAND, CALIF.

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to TRANS OCEANIC SALES CO., 6 HARRISON STREET, (Mail or street address of consignee—For purposes of notification only.)

Destination NEW YORK CITY State of NEW YORK County of

Route SP- UP - CNW - NYC - LEHIGH To PIER 38 N.Y.

Delivering Carrier Car Initial Car No.

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Depot ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
515	KEGS OLIVES 11½#	57,680 lbs.		
12	BBLS. OLIVES IN BRINE 305	3,660 "		
	DUNNAGE	600 "		
		61,940 lbs.		
		128		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges advanced: $

Collect On Delivery $ For Account Of And Remit To

Street, City, State

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

WEST COAST PRODUCTS CORPORATION Shipper.

Per H. Rachow

E. W. Parsons

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

2

Exhibit B-3

(Issued in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1938, and June 15, 1941.)

100M

THIS MEMORANDUM is an acknowledgment that a Bill of Lading has been issued and is set the Original Bill of Lading, nor a copy of duplicate, covering the property named herein, and is intended as a filing or record.

S - 1553
3rd SHEET

SOUTHERN PACIFIC LINES
SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. SP-38

subject to the classifications and tariffs in effect on the date of the receipt by the carrier of the property described in the Original Bill of Lading,

AND, CALIF. APRIL 6, 1949. 194

RECEIVED in PRODUCE CORP., OAKLAND, CALIF. of contents of packages unknown), marked, consigned, and destined as indicated below, which said rvice company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agree to carry to its usual place of destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination, it is mutually agreed, as to each carrier of all or any part of said route over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to IMPERIAL FOODS, 2612 EAST 40TH ST., CLEVELAND, OHIO.

CLEVELAND State of OHIO County of

Route: S.P., U.P., C.M.W. to GROCERS TERMINAL WHSE., GRAND AV. TRAN TRACK-516 W. KINZIE ST.,

Carrier CHICAGO, ILL. for partial unloading then N.Y.C. to CLEVELAND, OHIO. Car No. PRD 594445

DELIVERY ADDRESS DESIRED: Door to Door ( ), Door to Depot ( ), Depot to Door ( ), Depot to Depot ( ).

DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
SICILIAN STYLE OLIVES	45,050#		
" " " "	8,000#		
OIL CURED OLIVES	11,200#		
OLIVE OIL	2552 #		
DUNNAGE	600#		
Total Weight	67,202#	150	
DROP-OVER CAR AT GROCERS TERMINAL WAREHOUSE			
GRAND AVE. TRAN TRACK-516 W. KINZIE ST., CHICAGO			
FOR PARTIAL UNLOADING.			

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID.

Received $
to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per
(The signature here acknowledges only the amount prepaid.)

Charges advanced:
$

On Delivery $ For Account Of And Remit To

Street, City, State

Charge to be Paid By: Consignee ( ). Shipper ( ).

*If moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note: Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding per

GRAND PRODUCTS CORP. Shipper, Agent

Per

Permanent postoffice address of shipper

(This Bill of Lading is to be signed by the shipper or his agent if the carrier issuing same.)

3

Exhibit B-4

(For Use in Connection with Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification Territories, March 15, 1922, as amended August 1, 1929, and June 15, 1941.)

11-47 - 1500M

THIS SHIPPING ORDER must be legibly filled in, in ink, in ink or carbon and retained by carrier. Pencil, or pencil, or point.

S - 1553
2nd SHEET

SOUTHERN PACIFIC LINES

SOUTHERN PACIFIC COMPANY
PACIFIC MOTOR TRUCKING COMPANY

Shipper's No.
Agent's No. SP-39

RECEIVE, subject to the classifications and tariffs in effect on the date of the issue of this Shipping Order.

At ORLAND, CALIF. APRIL 7, 1949. 194

From WEST COAST PRODUCTS CORPORATION, ORLAND, CALIF. (the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said company (the word company being understood throughout this contract as meaning any person or corporation in possession of the property under the contract), agrees to carry to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination, it is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to MARKET TERMINAL WAREHOUSE, 100 PERRY ST., (Mail or street address of consignee—For purposes of notification only)

Destination BUFFALO State of NEW YORK County of

Route SP & UP - CNW - NYC.

Delivering Carrier NYC Car Initial S.P. Car No. 81988

SERVICE DESIRED: Door to Door ( ). Door to Depot ( ). Depot to Door ( ). Depot to Depot ( ).

No. Pkgs.	DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS	*Weight (Subj. to Corr.)	Class or Rate	Check Col.
68 bbls.	SICILIAN STYLE OLIVES	20800#		
190 kegs	" " "	52500#		
108 kegs	OIL CURED OLIVES	12075#		
		65175		
264 @ 2½ lbs	DUNNAGE	660#	1.50	
		65,835#		
		500		
		65,335		
		32,667.5		
		99,999.87		

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

(Signature of Consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

TO BE PREPAID

Received $ to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per (The signature here acknowledges only the amount prepaid.)

Charges advanced: $

Collect On Delivery $ For Account Of And Remit To

Street, City, State

C. O. D. Charge to be Paid By: Consignee ( ). Shipper ( ).

If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding _____ per _____

WEST COAST PRODUCTS CORP. Shipper

Per H. K. Kaufman

Permanent postoffice address of shipper P.O. Box 623, Orland, Calif.

2

☞ Agent must detach and retain this Shipping Order and must sign the Original Bill of Lading.

Exhibit C

26

SUBJECT TO ITEM X-148 OR SUCCESSIVE ISSUES THEREOF

T TO THE PROVISIONS OF TARIFF No. SO-68 (I. C. C. No. A-3391, C. T. C. No. A-891, OF AGENT L. E. KIPP), SUPPLEMENTS THERETO OR SUCCESSIVE ISSUES THEREOF

T. C. No. 814
(Cancels C. T. C. No. [illegible])

I. C. C. No. 1519
(Cancels I. C. C. No. [illegible]1506)

MF-I. C. C. No. B-42
(Cancels MF-I. C. C. No. [illegible]B-33)

ANS-CONTINENTAL FREIGHT BUREAU

(L. E. KIPP, Agent)

AST-BOUND TARIFF No. 3-S

(Cancels Tariff [illegible]3-R)

[illegible]pt portions under suspension in I. & S. Dockets 5363, 5371 and 5378.

— NAMING —

OCAL, JOINT, EXPORT, IMPORT AND PROPORTIONAL

ALSO JOINT RAIL-MOTOR

COMMODITY RATES

—FROM POINTS IN—

ARIZONA	MEXICO	NEW MEXICO	UTAH
CALIFORNIA	NEVADA	OREGON	

(Referred to in Item 54)

—TO POINTS IN—

AMA	INDIANA	MISSOURI	PENNSYLVANIA
NSAS	IOWA	NEBRASKA	RHODE ISLAND
DA	KANSAS	NEW HAMPSHIRE	SOUTH CAROLINA
RADO	KENTUCKY	NEW JERSEY	SOUTH DAKOTA
ECTICUT	LOUISIANA	NEW MEXICO	TENNESSEE
WARE	MAINE	NEW YORK	TEXAS
RICT OF	MARYLAND	NORTH CAROLINA	VERMONT
LUMBIA	MASSACHUSETTS	NORTH DAKOTA	VIRGINIA
IDA	MICHIGAN	OHIO	WEST VIRGINIA
GIA	MINNESOTA	OKLAHOMA	WISCONSIN
OIS	MISSISSIPPI		WYOMING

(Referred to in Item 52)

IED BY WESTERN CLASSIFICATION No. 71 (I. C. C. No. 29 AND C. T. C.-W. C. No. 27 OF R. C. FYFE, T), HEREINAFTER REFERRED TO AS WESTERN CLASSIFICATION, AS PROVIDED IN ITEM 600.

ED JANUARY 18, 1946

EFFECTIVE MARCH 1, 1946
Except as otherwise provided herein)

ISSUED BY

L. E. KIPP, Agent, 516 W. Jackson Boulevard, Chicago 6, Ill. (File 6-3-M)

U. S. A.)

(C. P.-40790)

SECTION 2 GENERAL COMMODITY RATES

ITEM No.	ARTICLES IN CARLOADS (Except as otherwise provided)	MIN. C. L. WT. (Pounds)	Rates in Cents per 100 Pounds (Except as noted) TO Points taking the following Group Rates (See Item 52)	FROM Points taking RATE BASIS 1 (See Item 54) L. C. L.	C. L.
75	Calcium Citrate or Citrate of Lime.	40,000 (Subject to Item 706)	A,B,C,C-1,D,E,F,G,H,I	.....	132
			J	.....	124
			K,K-1,L,M	.....	132
		70,000 (Subject to Item 706)	B,C,C-1,D,E,F,G,H,I,J,L,M	.....	88
		100,000 (Subject to Item 706)	A,B,C,C-1,D,E,F,G,H,I,J,K,L,M	.....	77
30	Candle Mounts, flat, wooden, wrapped in bundles.	L. C. L.	C-1	275	
			D,E,F,G,H,I,J	245	
	CANNED GOODS, PICKLES, PRESERVES, and other Articles as designated, viz.:				
	SECTION 1 (Subject to Item 706 and Note 20)		A		(24) 141
	Canned Goods, Pickles, Preserves, as described in and subject to package requirements of Item 125,		B		(24) 116
			C	(35) 245	(4) 105
	(24) Butter, peanut (Peanut Paste), in glass, earthenware or metal cans boxed, in pails or tubs crated, (32) in bulk in barrels, in cartons boxed, or in metal cans completely jacketed,		C-1	245	99
			D,E	215	(24) 99
			F,G,H,I	215	99
	Vinegar, in earthenware or glass packed in boxes,	40,000		175	
	Less carloads or in straight or mixed carloads (except as noted)		J	(35) 150	63
				(35) 125	
	ALSO		K	300	(4) (32) 105
	(a) Mixed carloads (except as noted) of any of the foregoing commodities with any of the following commodities:		K-1		106
			L	270	(3) (32) 105
	(b) Mixed carloads (except as noted) of any of the following commodities except will not apply on mixed carloads consisting only of two or more commodities included in the same item to which reference is made for description:		M	245	105
			A		(24) 102
			B		(24) 96
	Buttermilk, as described in Item 3801, in glass in barrels or boxes; in milk shipping cans; or (32) in bulk in barrels,	60,000 (Subject to Note 3)	C,C-1,D,E		(24) 88
			F,G,H,I		88
	Cider or Apple Juice, unfermented, other than frozen, as described in Item 4015, in barrels or boxes or in glass in crates,		J		77
			K		(4) (36) 88
	Cider Syrup (Boiled Cider), as described in Item 4015, in glass, earthenware or metal cans boxed, in pails or tubs crated, or (32) in bulk in barrels.		K-1	.....	90
			L....	..	(3) (36) 88
			M		88
0	Compounds, flavoring, or Imitation Flavors, N. O. I. B. N., liquid or paste, as described in Item 4160, in containers in barrels or boxes, in metal cans completely jacketed, or in bulk in barrels (Subject to Notes 16 and 17),				
	Feed, animal or poultry, viz.:				
	Meat or Fish, or a mixture containing Meat or Fish, not prepared for human consumption (Subject to Note 10):				
	Other than dehydrated, in hermetically sealed glass or metal containers in barrels or boxes,				
	Dehydrated, in containers, in barrels or boxes,				
	(33) Juice, citrus fruit, as described in Item 4160, in barrels or boxes (Subject to Note 5),				
	(33) Juice, grape (unfermented), other than frozen, in containers in barrels or boxes, or in glass or earthenware in crates with solid tops, or in bulk in barrels,				
	(33) (38) Juice, pineapple (unfermented), other than frozen, in glass, earthenware or metal cans in boxes, in mixed carloads only as provided in Note 7,				
	(30) Juice, prune (unfermented), other than frozen, in barrels or boxes,				
	Labels, paper, N. O. I. B. N., cut or not cut, prepaid, in packages, in mixed carloads only as provided in Note 4,				
	Milk (not malted), Buttermilk (not casein) or Dry Milk Solids, as described in Item 3801 (Subject to Note 18), in containers in bags, barrels, boxes or crates (Subject to Note 19), or in bulk in (32) barrels, boxes, double bags (Subject to Note 1) or multiple-wall paper bags,				
	Oil, cottonseed, refined, in glass, earthenware or metal cans boxed, in pails or tubs crated, or (32) in bulk in barrels,				
	(43) Oil, raisin seed (Grape Seed), refined, in glass, earthenware or metal cans boxed, or (32) in bulk in barrels,				
	Oranges, as described in Item 4160, in metal cans in crates,				
	Pectin, as described in Item 4160, in barrels or boxes or in metal cans in crates,				
	(33) (38) Pineapple, other than frozen, in glass, earthenware or metal cans in boxes, in mixed carloads only as provided in Note 7,				
	Syrup, as described in Item 4160, in metal cans partially or completely jacketed, in containers in barrels or boxes, or in bulk in barrels (Subject to Note 17),				
	Syrup, not medicated, N. O. S., in metal cans completely jacketed Subject to Note 14); in metal cans, other than friction top cans, in crates; in containers in barrels or boxes; or in bulk in barrels or kits (Subject to Note 13),				
	Syrup, raisin, in glass, earthenware or metal cans boxed, or in bulk in barrels,				
	(51) Vinegar, in bulk in barrels.				

(Continued on following page)

N. B.—For Explanation of Abbreviations, see Item 1.

APPLICATION OF RATES

LIST OF ARTICLES TAKING RATES PROVIDED FOR "AGRICULTURAL IMPLEMENT PARTS, OTHER THAN HAND" IN ITEMS MAKING SPECIFIC REFERENCE HERETO

Agricultural Implement Parts, other than hand, classified Class A in Western Classification under heading of "Agricultural Implement Parts, other than hand," in packages as prescribed (also loose when so provided) for such rating in Western Classification, viz.:

Agricultural Implement Parts, other than hand, iron or steel, N. O. I. B. N.,
Agricultural Implement Parts, other than hand, wooden, finished, N. O. I. B. N.,
Agricultural Implement Parts, other than hand, wooden, in the white, N. O. I. B. N.,
Aprons, harvester or reaper,
Attachments, binding, harvester or reaper,
Attachments, fertilizer distributor, for grain or seed drills or planters,
Attachments, sulky,
Band Cutters and Self Feeders combined, for Threshers,
Band Cutters, Self Feeders and Wing Bundle Carriers combined, separator or thresher,
Bars, cutter,
Beams, wooden, finished or in the white,
Blocks (tread), horse power,
Bottoms, plow,
Boxes, harrow ball,
Bunchers, mower,
Carriers (bundle), binder, harvester, reaper, separator or thresher,
Coulters, rolling,
Disks and Drag Bars combined,
Frames, harrow,
Guards, knife with guard plates attached, for Harvesters, Mowers or Reapers,
Guides (plowing), traction engine,
Guides, separator steering,
Handles, wooden, in the white or finished,
Hitches, binder or drill,
Hoists, hay press,
Knives, band, ensilage or feed cutter,
Knives, harvester, mower, reaper, self-feeder or atalk cutter,
Levers, horse power,
Pitmans, binder or mower,
Plates, guard for Harvesters, Mowers or Reapers,
Poles (wooden), finished,
Poles (wooden, in the white), ironed or not ironed,
Poles, separator steering,
Raspa, clover huller,
Rowers, check,
Screens, thresher,
Seats (with or without seat springs), iron or steel, finished,
Sections, knife, for Harvesters, Mowers or Reapers,
Shoes, grain drill,
Sieves, thresher,
Slats, apron, draper, hay sling or reel,
Spikes, clover huller or thresher,
Spools, harrow ball,
Sticks, apron, draper, hay sling or reel,
Sweeps, horse power,
Teeth, clover huller,
Teeth, rake, wooden or iron or steel,
Teeth, thresher,
Trays, harrow weight, iron or steel,
Tubes, grain drill, iron or steel, flexible,
Wheels (other than master [bull], machine finished gear or sprocket):
  Iron or steel,
  Iron or steel and wood combined,
  Wooden,
Wheels, master (Bull Wheels),
Windrowers, mower,
Woods, pitman.

LIST OF ARTICLES TAKING RATES PROVIDED FOR "CANNED GOODS, PICKLES AND PRESERVES" IN ITEMS MAKING SPECIFIC REFERENCE HERETO

CANNED GOODS, PICKLES, PRESERVES, in glass, earthenware or metal cans boxed, in pails or tubs crated, or in bulk in barrels, except as otherwise provided (Subject to Note 1), viz.:

Bread, brown, in metal cans in boxes,
Bread, date-nut, in metal cans in boxes,
Brine, sauerkraut, other than frozen, in barrels, boxes or kits,
Caviar, cooked, pickled or preserved, in glass, earthenware or metal cans boxed,
Chili Peppers, ground, including Chili Powder, in boxes,
Cocoanut, prepared, in boxes, or in metal cans in crates,
Cream or Milk, sterilized (not requiring refrigerated protection), in hermetically sealed containers in boxes,
Fish N. O. S., including Shell Fish, cooked, pickled or preserved, with or without cereal, fruit or vegetable ingredients, in glass, earthenware or metal cans boxed (Subject to Note 2),
Fish Roe (other than Canned Salmon Eggs prepared for fish bait), cooked, pickled or preserved, in glass, earthenware or metal cans boxed,
Fruit (other than dried, evaporated or fresh), N. O. S., canned or preserved in juice or in syrup or liquid other than alcoholic; Fruit Butter, Crushed or Drained Fruit, Fruit Jam, Fruit Jelly or Fruit Pulp (not dried fruit, ground or crushed), in packages named, or in kits, pails or tubs (Subject to Note 6),
Jam, glucose, in packages named, in metal cans crated, or in kits, pails or tubs,
Jelly, corn syrup, in packages named, in metal cans crated, or in kits, pails or tubs,
Juice, clam, in glass, earthenware or metal cans boxed,
Juice, fruit (unfermented), artificial or natural, N. O. I. B. N., other than frozen, in glass or earthenware in boxes, or in carboys, or in metal cans or pails in crates, or in bulk in barrels,
Juice, pineapple (unfermented), other than frozen, in glass, earthenware or metal cans in boxes, or in bulk in barrels,
Juice, sauerkraut, other than frozen, in barrels, boxes or kits,
Juice, tomato, other than frozen, in barrels or boxes, or in glass, earthenware or metal cans in crates,
Juice, vegetable, N. O. S., other than frozen, in barrels or boxes, or in glass, earthenware or metal cans in crates,
Leaves, grape, pickled in brine, in barrels,
Macaroni, Noodles, Spaghetti or Vermicelli, prepared, with or without cheese, meat or vegetables, in glass, earthenware or metal cans boxed,
Meats N. O. S., including Sausage, cooked, cured or preserved, with or without cereal or vegetable ingredients, in glass, earthenware or metal cans boxed, or in metal cans in crates (Subject to Note 2),
Milk (condensed or evaporated), liquid or paste, in metal cans completely jacketed or in crates, or in containers in barrels or boxes, or in bulk in barrels (Subject to Note 5),
Milk Food (other than malted milk), liquid, in barrels, or in metal cans in cartons in crates,
Mince Meat, in packages named, in cartons boxed, or in kits, pails or tubs,
Molasses N. O. I. B. N.,
Mushrooms, preserved in liquid,
Oil, corn, refined,
Olives, canned or preserved in juice or in syrup or liquid other than alcoholic,
Paste, tomato, in packages named, or in cans crated,
Pectin, fruit or vegetable, N. O. S., in packages named, or in metal cans crated,
Oil, olive,
Olive Oil Foots, Residuum or Sediment,

(Concluded on following page)

Issued from Supplement No. 65 to I. C. C. No. 1506 of Agent L. E. Kipp, effective February 1, 1946.
N.—For Explanation of Abbreviations, see Item 1

EXCEPTIONS TO WESTERN CLASSIFICATION GOVERNING TARIFF

em o.

ARTICLES

STRAIGHT OR MIXED CARLOADS (Subject to Note 1)

(a) STRAIGHT CARLOADS:
(1) Carload rates named in this tariff apply on straight carloads of articles named unless otherwise specifically provided in individual rate items.
(2) When a portion of a straight carload shipment of an article is in package or loose or in bulk other than as specified in the item in which the rate is named and is subject to provisions of Item 615, the higher rate as provided in Item 615 will be applied only on the actual weight of that portion of the shipment which does not conform with provisions of governing rate item.

(b) MIXED CARLOADS (Subject to Note 2).—Carload rates named in this tariff apply on mixed carloads under the following conditions only, viz.:
(1) Of two or more articles named in one item not containing alternating sections.
(2) Of two or more articles named in the same section of an item containing alternating sections.
(3) As otherwise specifically provided in individual rate items.

(c) Charges on mixed carload shipments for which mixed carload rates are provided will be determined by either of the following formulas, whichever results in the lower per car charge, viz.:
(1) Actual or authorized estimated weight for the entire shipment at authorized mixed carload rate subject to the minimum weight published in connection therewith; or—
(2) Actual or authorized estimated weight for one or more of the articles at authorized carload rate subject to minimum weight published in connection therewith, plus less than carload rate or rates at actual or authorized estimated weight for the other articles.

(d) When an item of this tariff provides rates for mixed carloads only, the rates apply unless otherwise provided on mixed carloads of any two or more of the articles named.

(e) Rule 10 of Western Classification does not apply.

Note 1.—The provisions of this item do not modify the provisions of Rule 15 of Western Classification on Premium shipments.
Note 2.—When there is included in a mixed carload shipment an article or articles in package or loose or in bulk other than as specified in the item in which the rate is named and which are subject to higher rate under the provisions of Item 615, the rate to be used in determining the "highest rate" on the article or articles subject to Item 615 will be the rate applicable on the article when shipped as specified in the item which names the rate. Charges on the article or articles not conforming to that specified in the governing rate item will be based on the provisions of Item 615, applied to the rate applicable to the mixed carload, at actual weight of such article or articles.

Household Goods, as described in Western Classification under head of "Household Goods," in less than carload lots, charges must be prepaid or guaranteed.

ADVANCEMENT OF FREIGHT CHARGES

Exception to Rule 8 of Western Classification—Advancing Charges

No charges of any description will be advanced to shippers, owners, consignees or agents thereof, nor to their draymen or warehousemen, except where tariff of carrier at point of origin or transit point provides for the advancing of such charges.

ARTICLES TOO LONG OR BULKY TO BE LOADED THROUGH SIDE DOOR WITHOUT USE OF END DOOR OR WINDOW IN CLOSED CAR

(The provisions of this item do not apply to points taking Group K, K-1, L or M rates nor to points in Eastern Canada; Group A, B and C rates are subject to Item 185.)

The provisions of Section 3, Rule 29 of Western Classification do not apply in connection with traffic moving from and to points named in this tariff.

(The provisions of this item do not apply to points taking Group A rates—[See Item 40].)

(a) Meat Hooks (not to exceed 700 in number per car) and Racks used in the transportation of Fresh Meat, Fresh Fish, Packing House Products as described in Item 1135 of Perishable Protective Tariff No. 13 (I. C. C. No. 22 of Agent J. J. Quinn), Butter, Butterine, Oleomargarine, Eggs, Cheese and Dressed Poultry in a refrigerator car, will be treated as part of such refrigerator car equipment and are transported without charge while in car on both loaded and empty movement.

When a carrier removes any or all of the above equipment for its own convenience it will return same to owner free of transportation charges.

(b) Refrigerator barrels, refrigerator boxes, meat crates, galvanized iron pans, galvanized iron tanks, ice cones, meat sticks, stilts and trays used as containers for or to protect shipments of meat or fresh fish; and meat hooks in excess of the amount necessary to equip a car (700 in number) will be returned to owner at fourth class rates, when returned in refrigerator cars or when removed by carrier for its convenience and returned by local freight. Carriers should show on billing and expense bill reference to car number from which accessories (Sec. b) were removed, naming the point at which they were removed.

When the above accessories (Sec. b) are returned in car, shipment is not subject to trap car rules published by carriers lawfully on file with the Interstate Commerce Commission.

REISSUED from Supplement No. 65 to I. C. C. No. 1506 of Agent L. E. Kipp, effective February 1, 1946.
N. B.—For Explanation of Abbreviations, see Item 1.

SECTION 2—GENERAL COMMODITY RATES

ITEM No.	ARTICLES IN CARLOADS (Except as otherwise provided)	MIN. C. L. WT. (Pounds)	Rates in Cents per 100 Pounds (Except as noted) TO Points taking the following Group Rates (See Item 52)	FROM Points taking RATE BASIS 1 (See Item 54) L. C. L.	C. L.
	Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails.		A,B	248	165
			C	245	165
			C-1	245	165
	Less carloads or in straight carloads	30,000 (Subject to Item 706)	D,E,F,G,H,I	(22)215	(22)165
	ALSO		J	(21)175 (22)150 (23)125	.....
	Mixed carloads of the foregoing commodity with one or more of the following commodities:		K,L	248	165
			M	245	165
0	**Oil, olive, in glass, earthenware or metal cans boxed, or in bulk in barrels,**	60,000 (Subject to Item 706)	C	.....	(22)138
	Olive Oil Foots, Residuum or Sediment, in glass, earthenware or metal cans boxed, or in bulk in barrels,		C-1,D,E,F,G,H,I	.....	138
	Olives, canned or preserved in juice or in syrup or liquid other than Alcoholic.				

Note.—The lowest charge applicable under any scale of rates, based on actual weight of shipment, but not less than the minimum weight specified in connection with the rate used, must be applied.
(21) In lots of less than 5,000 lbs. (Subject to Note).
(22) In lots of 5,000 lbs. and less than 10,000 lbs. (Subject to Note).
(23) In lots of 10,000 lbs. and over (Subject to Note).
(22) Rates apply also to Group 22 points (See Item 52).

	ONYX, viz.:				
8	**Blocks, Pieces or Slabs, N. O. S., polished or traced, in boxes or crates.**	L. C. L.	D,E,F,G,H,I	275	.....
			J	248	.....
6	**Orange Meal (edible), dried, flaked, in bags**	40,000 (Subject to Item 706)	A, B, C, C-1, D,E,F,G,H, I	.....	131
			J	.....	110
			K,K-1,L,M	.....	131
		60,000 (Subject to Item 706)	A, B, C, C-1, D,E,F,G,H, I	.....	121
			J	.....	100
			K,K-1,L,M	.....	121
84	**Ore, actual value exceeding $300.00 per ton of 2,000 lbs. (Subject to Notes 1 and 2 and Item 746).**	40,000	A,B,C,C-1,D, E,F,G,H,I	.....	289
	Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.		J	.....	255
	Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).		K,K-1,L,M	.....	289
84	**Ore, actual value not exceeding $300.00 per ton of 2,000 pounds (Subject to Notes 1 and 2 and Item 746).**	40,000	A,B,C,C-1	.....	256
	Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.		D,E,F,G,H,I	.....	240
			J		210
	Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).		K,K-1,L,M		256
86	**Ore, actual value not exceeding $100.00 per ton of 2,000 pounds (Subject to Notes 1 and 2 and Item 746).**	40,000	D,E	.....	141
	Note 1.—Shipments are entitled to sampling in transit privileges as authorized in tariffs of individual lines, parties hereto, and lawfully on file with the Interstate Commerce Commission.		F,G,H,I	.....	(21)141
			J		(21)117
	Note 2.—Rates in connection with Southern S. S. Co. apply only on shipments in sacks (See Item 177).				
	(22) Rates do not apply from points on SP in Arizona or New Mexico.				

Rates are subject to Item 185.
N. B.—For Explanation of Abbreviations, see Item 1.

[Title of District Court and Cause.]

AFFIDAVIT OF E. J. SWANSON

State of California,
City and County of San Francisco—ss.

E. J. Swanson being duly sworn deposes and says:

I am a citizen of the United States and of the State of California residing in Alameda County, California. My office headquarters are 717 Market Street, San Francisco.

I have been employed by Trans-Continental Freight Bureau in various capacities for more than 15 years. My present position is Bureau Chief Traveling Inspector and I have been employed in that capacity for the past 4 years. My duties in the said employment for Trans-Continental Freight Bureau include Supervision of field forces, investigating claims and making of inspections and investigations for the purpose of determining the correct description of various shipments of freight transported by rail carriers from and to various points in California.

In the course of my duties as Bureau Chief Traveling Inspector I was requested during the early part of 1949 to make an investigation at Orland, California with respect to various shipments of olives which had been and were being transported by rail carriers from that point to various destinations in the eastern part of the United States. In

response to this request, on or about the 22nd day of April, 1949, I called at the plants of Musco Olive Products Company and West Coast Products Co., at Orland, California.

In my investigation at the plant of the Musco Olive Products Company I developed that olives which has been and were being shipped during 1948 and 1949 under the description of "Black Olives" were processed or cured by placing them in a heavy brine solution where they remained until at or about the time the curing process was completed; after such process the olives are removed from the brine solution and coated with olive oil, after which they are placed in kegs or barrels for shipment. There is no liquid in the kegs or barrels except the olive oil and brine solution which may drain from the olives.

At the plant of the West Coast Products Co., I developed that black olives had been and were being shipped during 1948 and 1949 under the description "Oil Coated Olives" and that such olives were processed or cured by placing them alternately in strong brine solution and wet salt pack until at or about the time the curing process was completed. Thereafter the olives are removed from the brine solution or wet salt pack and allowed to fully dry. At the time of packing the olives in kegs or barrels they are coated with olive oil which gives the fruit a glossy appearance.

The only difference in the processing method used by Musco Olive Products Co. and West Coast

Products Co., is that the former uses a brine solution for curing olives whereas the West Coast Products Co., uses brine solution and wet salt pack alternately for curing olives. The end result of the two processing methods is identical.

/s/ E. J. SWANSON.

Subscribed and sworn to before me this 12th day of March, 1952.

[Seal] /s/ RUTH W. GEORGE

Notary Public in and for the City and County of San Francisco, State of California.

Receipt of copy acknowledged.

[Endorsed]: Filed March 12, 1952.

In the District Court of the United States in and for the Northern District of California, Southern Division

No. 29726—Civil

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

AFFIDAVIT OF AMADEO PAONI IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of California,
County of Glenn—ss.

Amadeo Paoni, being first duly sworn, deposes and says:

That during the years 1948 and 1949 and for some years prior thereto and ever since he has been, and now is, the Vice President and Manager in Charge of Production of West Coast Products Corporation, the defendant in the above-entitled.

That he was personally in charge of the curing, processing, packing and shipping of all of the olives which were shipped from Orland, California, on the

respective dates and in the cars following, to wit:

Mar. 8, 1948 .....Penn 104387
Mar. 17, 1948 .....Wab 86233
Apr. 6, 1949 .....TNO 59444
Apr. 7, 1949 .....SP 81989

That the four cars hereinbefore set forth are the four cars covered by the above-entitled action and are the cars upon which the plaintiff above-named seeks to obtain additional tariff charges from the defendant above-named.

That all of the olives shipped in all of said cars were preserved in juice or liquid other than alcoholic and that none of said olives were salt cured, not preserved in liquid.

That all of the olives referred to in the various bills of lading issued by the plaintiff upon the shipments hereinbefore mentioned referred to as oil-coated olives or as oil cured olives were processed under the supervision of affiant; that all of said olives were processed in the ripe state; that in the first part of the process used by affiant upon said olives some salt was used but thereafter affiant caused all of said salt to be thoroughly washed from the olives and when the olives were finally cured there was no salt therein; that in completing the processing of said olives they were cured with and packed in olive oil and when shipped they were packed in 100 pound kegs; that said kegs contained no salt whatsoever and did contain olive oil

and said olives were preserved in olive oil and in their own juice and in liquid other than alcoholic.

Affiant avers that it is not true that the black olives so shipped as oil cured or oil coated were placed in a strong brine solution or were packed in wet salt for a few days or were later or at all placed in the brine solution again; that it is not true that when the salt had penetrated to the pits of the olives they were removed from the brine and allowed to fully dry or that the salt had ever penetrated to the pits of the olives; that it is true that the olives so shipped by the defendant were coated with olive oil and that it did give them a glossy appearance but that so doing was not for the purpose of preventing them from further drying out but said olive oil was placed in the kegs with said olives for the purpose of preserving them, and that it is not true that the only liquid in the containers was that which drained from the olives but in addition thereto there was the olive oil placed therein by employees of said defendant under the supervision of affiant in the processing and shipping of said olives and that thereby the said olives were preserved in juice or liquid other than alcoholic.

That it is not true that the olives in the said shipments described as oil coated olives or oil cured olives were salt cured olives which were not preserved in any liquid and that it was not necessary or proper to apply to said olives the base rates for salt cured olives, not preserved in liquid, as provided in Item 5670 of Trans-Continental Freight

Bureau Eastbound Tariff No. 3-S but on the contrary the base rate applicable thereto was that referred to in Item No. 3800 of said Tariff.

That it is not true that the said olives so shipped by said defendant were processed or cured by placing them alternately in strong brine solution or wet salt pack until at or about the time the curing process was completed, and that it is not true that the olives were thereafter removed from the brine solution or wet salt pack and allowed to fully dry, but in that behalf affiant avers that when the said olives were removed from the salt all of the salt was fully removed therefrom and said olives were never placed in a brine solution. That it is true that at the time of packing the olives they were coated with olive oil but in addition thereto they were shipped in olive oil and there was no coating given for the purpose of giving the fruit a glossy appearance.

That the olives refered to in the said bills of lading covering said shipments as olives in brine or as Sicilian Style olives were processed and shipped under the supervision of affiant; that said olives were processed in the green state in brine and were shipped in brine, packed in kegs of 100 pounds each and in barrels of 165 pounds each; that all of said olives so shipped by said defendant in the various shipments hereinbefore mentioned were preserved in juice or liquid other than alcoholic.

That all of the olives so shipped in all of said four shipments were all processed, packed and

shipped under the supervision of affiant and that that all of the same were olives provided for in Item 3800 of said tariff and none of the same were olives referred to in Item 5670 of said tariff.

/s/ AMADEO PAONI.

Subscribed and sworn to before me this 20th day of June, 1952.

[Seal] /s/ H. W. HOSKING,
Notary Public in and for the County of Glenn, State of California.

[Endorsed]: Filed June 24, 1952.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT E. DAVIS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

State of California,
City and County of San Francisco—ss.

Robert E. Davis, being first duly sworn, deposes and says:

That he is a traffic consultant; that he has been engaged in said profession for the period of twelve (12) years and prior thereto was employed by railroad companies in the examination and fixing of tariffs and freight rates.

That he has examined four freight bills covering shipments made by West Coast Products Corpora-

tion, the defendant in the above-entitled action, over the railroad of Southern Pacific Company and covering shipments made on the dates and in the cars following:

Mar. 8, 1948 .....Penn 104387
Mar. 17, 1948 .....Wab 86233
Apr. 6, 1949 .....TNO 59444
Apr. 7, 1949 .....SP 81989

That with reference to Car TNO 59444 the calculations whereby said Southern Pacific Company claims a balance of $342.45 are incorrect; that even upon the assumption that Item 5670 of the tariff in question is applicable to the olives described as oil cured olives in the bill of lading covering said car there were but 11,200 pounds of this type of olives in said car. Under Rule 10, Section 3, of the Consolidated Freight Classification the carrier must use the less carload shipment rate on a quantity contained in the carload if that basis costs less than using the carload as a whole. Therefore, using the less carload rate of $3.80 in accordance with Item 5670 on said quantity of olives the freight charge would amount to $425.60. The remainder of 55,602 pounds of Sicilian type olives in said car, which undisputably come under Item 3800, at the rate of $1.50 on a minimum weight of 60,000 pounds amounts to $900.00, and adding these two items together, even if Item 5670 of the tariff is used as to the oil cured olives, would make a total of $1325.60, plus 5% surcharge, or $1391.88, instead of

$1561.82 attempted to be charged by the plaintiff above named.

That with reference to Car SP 81989 the said car covered 53,100 pounds of Sicilian type olives, which are unquestionably chargeable under Item 3800, and 12,075 pounds of oil cured olives. Based upon the same calculation hereinbefore set out the correct balance claimed by the said plaintiff should be the sum of $409.87. In this regard affiant calls attention to the fact that in the calculation of its freight bill the said plaintiff has committed an error in addition and that using the figures upon which the plaintiff bases its claim the difference in its billing should be $515.98 instead of $412.99, but affiant further avers that neither of said amounts is correct and that even under Item 5670 the correct balance would be $409.87 on the oil cured olives.

/s/ ROBERT E. DAVIS.

Subscribed and sworn to before me this 18th day of June, 1952.

[Seal] /s/ CHALMER MUNDAY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 24, 1952.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of August, in the year of our Lord one thousand nine hundred and fifty-two.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

MINUTES OF AUGUST 25, 1952

This case came on for hearing on motion for summary judgment.

After argument by respective counsel, it is ordered that said motion for summary judgment be denied.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS

The plaintiff, Southern Pacific Company, requests the defendant, West Coast Products Corp., within 10 days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

That each of the following statements is true:

1(a). That on or about March 8, 1948, at Orland, California, defendant tendered to plaintiff car PA

104387 containing olives for shipment to New York, New York.

1(b). That Exhibit A attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 1(a).

1(c). That the document described in paragraph 1(b) was signed in behalf of defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of defendant.

1(d). That the facts stated in the said Exhibit A are correct.

1(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit A.

2(a). That on or about March 17, 1947, at Orland, California, defendant tendered to plaintiff car Wabash 86233 containing olives for shipment to New York, New York.

2(b). That Exhibit B attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 2(a).

2(c). That the document described in paragraph 2(b) was signed in behalf of the defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant.

2(d). That the facts stated in the said Exhibit B are correct.

2(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit B.

3(a). That on or about April 6, 1949, at Orland, California, defendant tendered to plaintiff car T&NO 59444 containing olives for shipment to Cleveland, Ohio.

3(b). That Exhibit C attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 3(a).

3(c). That the document described in paragraph 3(b) was signed by A. P. Paoni per S.A.K.; that the said party who signed the said document was at said time of signing a duly authorized representative of the defendant.

3(d). That the facts stated in the said Exhibit C are correct.

3(e). That the plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit C.

4(a). That on or about April 7, 1949, at Orland, California, defendant tendered to plaintiff car SP 81989 containing olives for shipment to Buffalo, New York.

4(b). That Exhibit D attached hereto is a correct copy of the shipping order copy of the bill of

lading covering the shipment described in paragraph 4(a).

4(c). That the document described in paragraph 4(b) was signed in behalf of the defendant H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant.

4(d). That the facts stated in the said Exhibit D are correct.

4(e). That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit D.

5(a). That the amount of freight charges collected by plaintiff for transportation of shipment in car PA 104387 was $938.18 including tax.

5(b). That the amount of freight charges collected by plaintiff for transportation of shipment in car Wabash 86233 was $943.72 including tax.

5(c). That the amount of freight charges collected by plaintiff for transportation of shipment in car T&NO 59444 was $1,061.37 including tax.

5(d). That the amount of freight charges collected by plaintiff for transportation of shipment in car SP 81989 was $1,028.86 including tax.

6. That the freight charges referred to in paragraphs 5(a), 5(b), 5(c) and 5(d) were assessed and computed on the basis of a rate provided in Item 3800 of Trans-Continental Freight Bureau East-

bound Tariff No. 3-S for commodities described as:

> "Olives, canned or preserved in juice, or in syrup or liquid other than alcoholic."

7. That Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S provides freight rate which is applicable to shipments moving from Orland, California, to eastern destination described as:

> "Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

8(a). That freight charges on the shipment in car PA 104387, covered by shipping document identified as Exhibit A, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1,304.66.

8(b). That freight charges on the shipment in car Wabash 86233, covered by shipping document identified as Exhibit B, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1,312.36.

8(c). That freight charges on the shipment in car T&NO 59444, covered by shipping document identified as Exhibit C, are in the sum of $1,403.82, and in computing the said sum the rate referred to in Paragraph 7 herein was applied to the 100 kegs of oil cured olives in said car.

8(d). That freight charges on the shipment in car SP 81989, covered by shipping document identified as Exhibit D, are in the sum of $1,426.80, and

in computing the said sum the rate referred to in Paragraph 7 herein was applied to the 105 kegs of oil cured olives in said car.

9. That if the freight charges as computed in 8(a), (b), (c) and (d) above apply to the movement of said four freight cars, then the defendant owes to the plaintiff the sum of $1,475.51 for freight charges and $44.26 Federal tax on said sum of freight charges.

Dated: March ...., 1953.

.....
A. T. SUTER,

.....
FREDERICK E. FUHRMAN,

Attorneys for Plaintiff.

EXHIBITS A, B, C, D

[Exhibits A, B, C, D, attached to the foregoing Request for Admissions are identical to Exhibits B-1, B-2, B-3 and B-4 attached to Plaintiff's Notice of Motion for Summary Judgment. See pages 22 to 25 of this printed record.]

Receipt of copy acknowledged.

[Endorsed]: Filed March 24, 1953.

[Title of District Court and Cause.]

ADMISSIONS

Defendant, in response to the request of the plaintiff above named upon said defendant to make certain admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial states as follows;

Admits all the statements numbered 1(a) to and including 6.

Admits statements 7, 8(a), 8(b), 8(c), 8(d) and 9, with the qualification that said defendant does not admit that Item 5670 of Trans-Continental Freight Bureau Eastbound Tariff No. 3-S is applicable to the olives in question, but contends that Item 3800 thereof is applicable, and denies that any amount whatsoever is due by the defendant to the plaintiff.

Dated: April 23, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 28, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE SUBMISSION AND REOPEN TRIAL

To the plaintiff above named and to Messrs. A. T. Suter and Frederick E. Fuhrman, its attorneys:

You Will Please Take Notice that on Friday, the 5th day of June, 1953, at the hour of 9:30 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, at the courtroom of Hon. Louis Goodman, one of the judges of the above-entitled court, Room 258 of the United States Post Office and Court House Building, at Mission and Seventh Streets, San Francisco, California, the defendant above named will move the above-entitled court for an order setting aside the submission of the above-entitled action, reopening the trial thereof to permit further testimony to be taken, and setting a date for the hearing of said further testimony.

Said motion will be made upon the grounds that since the submission of the above-entitled action the defendant has discovered evidence of an important nature bearing upon the interpretation to be given to the tariffs upon the basis on which the above-entitled action is to be determined by the above-entitled court covering the use of olive oil for the preserving of olives and showing that the charge for olives coated with olive oil for preserving should come within the lower tariff and that the plaintiff should not be entitled to recover judgment against

said defendant; that the said interpretation is indicated by letters written by the plaintiff above named to various persons on the 9th day of April, 1953, and the 11th day of May, 1953, copies of which said letters are annexed hereto and made a portion hereof, and that the defendant above-named is entitled to subpoena persons employed by said plaintiff as its witnesses and to cause said persons to produce the originals of letters from Trans-Continental Freight Bureau upon said interpretation of said type of olives are based and to furnish further testimony to support the case of the defendant herein.

Said motion will be based upon this notice, upon all the files and pleadings in the above-entitled action, upon the testimony heretofore taken and the arguments heretofore had before the above-entitled court, and upon such evidence, oral and documentary, as may be adduced at the hearing hereof.

Dated: May 25, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

EXHIBIT A

Southern Pacific Company
65 Market Street
San Francisco, California

April 9, 1953.

File 2-TC-810-1.

Mr. C. J. Reidy, ATM,
California Packing Corporation,
215 Fremont St.,
San Francisco 19, Calif.

Mr. Ruland Hardy,
Golden State Olive Co.,
P. O. Box 287,
Corning, Calif.

Mr. J. P. Ventre, TM,
Howard Terminal,
P. O. Box 857,
Oakland, Calif.

Subject: Olives, Salt Cured, Coated with Olive Oil for Preserving, CL-EB-Apn. D-9598.

Gentlemen:

Refers to Mr. Riedy's file 40-1 of February 17, Mr. Hardy's letter of January 6, and Mr. Ventre's letter of March 23 on the above subject:

On April 6, for approval or disapproval not later than April 21, 1953, the Standing Rate Committee of the Trans-Continental Freight Bureau issued the following recommendation on Trans-Continental

Freight Bureau Application D-9598 and Supplement 1 thereto:

"(1) That the application as presented be declined.

"(2) Amend Item 5670-series, Tariff 2-s, as follows:

(a) Eliminate rates subject to Min. C. L. wt. of 60,000 lbs.

(b) Subject entry covering 'Olives, salt cured, not preserved in liquid, etc.' to a note reading:

Note—Rates also apply on salt cured olives which are coated with olive oil as a preservative, in barrels or kegs.

(c) Designate present publication as 'Section 1.'

(d) Add Section 2 with commodity description reading:

Olives, salt cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails (subject to Note (X). Less carloads or in straight carloads

Also

Mixed carloads of the foregoing commodity with one or more of the following commodities:

Canned or preserved foodstuffs as described in Item 3800 (subject to Note xx)

and subject to Min. C. L. wt. of 60,000 lbs., from Rate Basis 1 or 4 points to Groups A, B, C, C-1,

C-2, C-3, C-4, D, D-1, D-2, D-3, D-4, E, E-1, E-2, E-3, E-4 E-5 E-6, F, F-1, G, H, I, K, K-1, K-2, L, L-1, M, M-1 and N, at rate of 200 cents per 100 lbs. (Subject to Tariff X-175-Series.)

Note (X) as explained in sub-paragraph (b) above.

Note xx.—(The provisions of sub-paragraph (c) of paragraph (2) of Item 31 do not apply in connection with this Note.) Articles made subject to this Note are subject to the following conditions:

(a) Charges on the canned or preserved foodstuffs shall be based on actual weight at the following rates:

Rates in cents per 100 lbs. to points shown in group:

A	B	C, C-1, C-2, C-3, D, D-4, E, E-6, M, M-1
174	164	150

C-4, D-1, D-2, E-1, E-3, E-4,	D-3, E-2, E-5, F, G, H, I, N	
143	147	143

K, K-2, L, L-1	K-1
	154

(b) The weight of the articles made subject to this Note may be used to make up the min. C. L. wt. prescribed in this item.

(c) When the weight of a mixed carload does not equal the min. C. L. wt. prescribed in this Item, the weight necessary to make up the prescribed min. C. L. wt. is charged on basis of the highest rated article in the car.

(Rates are subject to Tariff X-175-B)

(3) No rate advice to be issued until Eastern Railroads concur."

Reasons in support of this recommendation are as follows:

"This application, as amended, is for a reduction in the eastbound carload rates on salt-cured olives coated with olive oil for preserving, in barrels or kegs, to the level of the canned goods rates in Item 3800-series of Tariff 2-S, which rates presently apply on olives, canned or preserved in juice or in syrup or liquid other than alcoholic, in containers as specified in Item 125.

"The present rates on salt cured olives, not preserved in liquid, in Item 5670 are represented to be entirely too high to move this tonnage by rail, with the result that it is moving via water to territory close to the Atlantic Seaboard and by truck to interior territory.

"Item 5670 carries two scales of carload rates, subject to minimum carload weights of 30,000 lbs. and 60,000 lbs. However, there are no rates at 60,000 lbs. to the Southeast nor to Groups A or B.

"The potential tonnage of olives of the character here involved, which original in the northern Sacramento Valley in California, is estimated at some 15 to 20 carloads per season which runs from December through May. Some of the movement contemplated would be in mixed carloads with canned goods and the fact that such mixture is not permitted on basis of the canned goods rates has re-

sulted in inability of the rail lines to secure any of the business.

"Eastbound Intercoastal Tariff 2-C (Item 210) includes olives, unqualified, in barrels, kits, pails or other packages named, in the canned foodstuffs list at carload rate of $1.37 ($1.19 plus 15%) minimum weight 20,000 pounds, although the rate in Item 490 on olives, salt-cured, in parchment-lined waterproof boxes, at the same minimum, is $1.50 ($1.30 plus 15%).

"We are reliably informed that the $1.37 rate is being applied on the olives involved in this application, a good portion of which moves to the New York area. To this is added an average trucking charge of 25 cents from Orland or Corning, Calif., to the port, 2½ cents wharfage, 10 cents segregation charge, and an average 25 cent trucking charge from dock to New York, total approximately $1.99½ plus marine insurance.

"Shippers have indicated that for the rail lines to secure this movement it will be necessary to provide a rate which will be no higher than the cost of water or truck shipments.

"The canned goods rate to Group A at 60,000 lbs. minimum is $1.74 plus 12 cents under Tariff X-175-B, equal to $1.86 per 100 lbs. At the 40,000 lb. minimum the Group A rate is $2.40 plus 12 cents, equal to $2.52.

"While olives packed in this manner cannot be loaded as heavy as those packed in brine we are advised that there is not difficulty in loading to the

minimum weights prescribed for canned goods, and we believe that no change should be made in the present rates in Item 5670 at 30,000 lbs.

"However, we think that some reduction in the carload rates at 60,000 pounds is warranted in order to secure some of this tonnage but we do not believe that the competitive situation justifies rates as low as on canned goods.

"Our best judgment is that a rate of $2.00 (subject to Tariff X-175-series) equivalent to $2.12, to Groups A, K and west, at 60,000 lbs. minimum, with provision for mixing with canned goods at the rate on each, should be adequate and we so recommend."

We have not as yet completed our study of this recommendation but are passing it along promptly as information. Any comments you may care to make will be appreciated.

Yours truly,

/s/ H. W. KLEIN.

cc—Mr. P. P. Dougherty, FTM, SP Co., San Francisco, Calif.
Mr. W. G. Barr, DFA, SP Co., San Francisco, Calif.
Mr. O. V. Gibson, DFA, SP Co., Sacramento, Calif.
(File A-1450-Olives, 2/13/53)
Mr. C. H. Reeves, DFA, SP Co., Oakland, Calif.
Mr. C. E. Ward, DFA, SP Co., Fresno, Calif.
(File B-1330-Olives, 2/19/53)

Southern Pacific Company
65 Market Street
San Francisco, California

At Chicago, May 11, 1953.

File: TC-810-1.

Mr. Ruland Hardy, Manager,
Golden State Olive Company,
P. O. Box 287,
Corning, California.

Subject: Salt Cured Olives, Coated with Olive Oil for Preserving, CL, EB. (TCFB Application D-9598)

Dear Sir:

Referring to your letter of April 15th on the above subject:

Am pleased to inform you that at meeting in Chicago today the Freight Traffic Manager's Committee of Trans-Continental Freight Bureau disapproved the Standing Rate Committee's recommendation of April 6th and in lieu thereof approved the following changes:

1. Cancel rates except as to LCL rates to Groups A, B and C in Item 5670, Tariff 2-S, and amend Item 125, Tariff 2-S, eliminating in connection with entry on olives the words "in juice or in syrup or in liquid other than alcoholic."

In effect, the above action will permit shipments of salt cured olives in straight carloads or in mixed

carloads with canned goods at the rates no in effect on canned foodstuffs generally.

Yours truly,

/s/ E. J. LARSON.

cc: Mr. P. P. Dougherty, FTM, SP Co., San Francisco, Calif.
Mr. O. V. Gibson, DFA, SP Co., Sacramento, Calif.
(File A-14-50, Olives, Feb. 13, 1953.)

Receipt of copy acknowledged.

[Endorsed]: Filed May 26, 1953.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the court room thereof, in the City and County of San Francisco, on Friday, the 5th day of June, in the year of our Lord one thousand nine hundred and fifty-three.

Present: The Honorable Louis E. Goodman, District Judge.

[Title of Cause.]

MINUTES OF JUNE 5, 1953

This case came on for hearing on the motion of defendant to set aside submission and to re-open case for further trial.

After hearing Mr. Picard, attorney for the defendant, it is ordered that said motion be denied.

Defendant marked for identification Defendant's Exhibits C and D.

Ordered this case again submitted on memorandums to be filed in 10-10 days, and continued to June 26th for submission.

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

It is clear that the tariff classification "Olives, salt-cured, not preserved in liquid" was applicable to the olives for whose transportation plaintiff seeks to recover additional freight charges. Judgment may therefore enter in favor of plaintiff, upon findings of fact and conclusions of law to be presented according to the Rules.

Dated: July 9, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed July 10, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for trial before this court sitting with a jury, Honorable Louis E. Goodman presiding, A. T. Suter and Frederick E. Fuhrman of San Francisco, California, appearing for the plaintiff and Albert Picard of San Francisco, California, appearing for the defendant.

Said action was tried on May 11, 1953, and at the conclusion of plaintiff's case the jury was discharged. Evidence both oral and documentary was introduced on behalf of the parties, and after argument and filing of briefs, the said cause was submitted after which the court ordered that judgment be entered for the plaintiff, and the court now makes the following:

Findings of Fact

I.

That this action arises under a law of the United States regulating interstate commerce in that it arises under Section 6 (7) and other sections of Part I of the Interstate Commerce Act, under which this court has jurisdiction under Title 28, U. S. Code, Section 41, Subdivision (8).

II.

The plaintiff, Southern Pacific Company, is now and at all times herein mentioned was a corporation existing under and by virtue of the laws of the

State of Delaware, authorized to do and doing business in the State of California.

III.

That defendant, West Coast Products Corporation, is now and at all times herein mentioned was a corporation organized and existing under the laws of the State of California and having its principal place of business in the City and County of San Francisco, State of California.

IV.

That the defendant, West Coast Products Corporation, was the consignor and shipper of the following described shipments of olive products from Orland, California:

Car No.	Description of Shipment on Bill of Lading	Date of Shipment	Destination
PA 104387	540 Kegs Oil Coated Olives 53 Kegs Standard Size 80 Kegs Medium Size 243 Kegs Large Size 100 Kegs Extra Large Size 64 Kegs Mammoth Size	3/ 8/48	New York, New York
Wab. 86233	515 Kegs Oil Coated Olives 12 Bbls. Olives in Brine	3/17/47	New York, New York
T. & N. O. 59444	265 Kegs Sicilian Style Olives 25 Bbls. Sicilian Style Olives 100 Kegs Oil Cured Olives 5 Drums Olive Oil	4/ 6/49	Cleveland, Ohio
S. P.81989	65 Bbls. Sicilian Style Olives 190 Kegs Sicilian Style Olives 105 Kegs Oil Cured Olives	4/ 7/49	Buffalo, New York

V.

That the said shipments were transported by plaintiff as initial carrier and its connecting carriers and were delivered to the consignees thereof as directed by the defendant.

VI.

That freight charges for transportation of the said shipments have heretofore been paid in the sum of $3,972.13, including Federal transportation tax.

VII.

That all of the said shipments included either olives named "oil coated olives" or olives named "oil cured olives," all of which said olives were black olives which were salt cured and which were not preserved in liquid at the time of and during transportation of these said shipments.

VIII.

That at the time of and during transportation of the said shipments, Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S, was duly posted, published, and on file with the Interstate Commerce Commission, and was lawfully in effect and applicable to the said shipments; that Item 5670 of said tariff contained tariff description reading in part as follows:

"Olives, salt cured, not preserved in liquid * * *."

IX.

That the total freight charges on said shipments

computed on the basis of the freight rate provided in said Item 5670, together with applicable increases thereon, are the sum of $5,447.64, and $44.26 in addition thereto as and for applicable Federal taxes.

Conclusions of Law

I.

That this court has jurisdiction of the subject matter and the parties to this action.

II.

That under the facts found herein the lawful freight charges for transportation of the said shipments are computed on the basis of the rate provided in Item 5670 of Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S, together with applicable increases thereon, and are in the sum of $5,447.64; that defendant, West Coast Products Corporation, is lawfully obligated to pay to plaintiff the difference between freight charges and tax previously paid in the sum of $3,972.13 and lawful freight charges, in the sum of $5,447.64, or $1,475.51 plus Federal transportation tax thereon in the sum of $44.26, or a total of $1,519.77.

III.

That plaintiff have judgment against defendant, West Coast Products Corporation, in the sum of $1,519.77, together with interest at the rate of 6 per cent per annum computed from the date of the

entry of judgment herein and its costs of suit herein.

Let the judgment be entered accordingly.

Dated: July 23, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Receipt of copy acknowledged.

Lodged July 16, 1953.

[Endorsed]: Filed July 23, 1953.

In the District Court of the United States, in and for the Northern District of California, Southern Division

No. 29726—Civil

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORP., a Corporation,

Defendant.

JUDGMENT

The above-entitled action came on regularly for trial on May 11, 1953, before the above-entitled court, sitting with a jury, Honorable Louis E. Goodman presiding, A. T. Suter and Frederick E. Fuhrman of San Francisco, California, appearing for the plaintiff and Albert Picard of San Fran-

cisco, California, appearing for the defendant, West Coast Products Corporation, at which time evidence both oral and documentary was introduced on behalf of the parties, and at the conclusion of plaintiff's case, said jury was discharged, and after argument and the filing of the briefs, the said cause was submitted. Thereafter the court rendered, made and filed herein its Findings of Fact and Conclusions of Law that plaintiff have judgment against the defendant. And now, the premises considered, it is hereby

Ordered, Adjudged, and Decreed that plaintiff, Southern Pacific Company, have judgment of and from defendant, West Coast Products Corporation, in the sum of $1,519.77, together with interest at the rate of 6 per cent per annum, to be computed from the date of entry of judgment herein and its costs of suit.

Dated this 23rd day of July, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form in accordance with Rule 5 (d).

. . . . . .
Attorney for Defendant, West Coast Products Corporation.

Receipt of copy acknowledged.

Lodged July 16, 1953.

[Endorsed]: Filed July 23, 1953.

Entered July 24, 1953.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes West Coast Products Corp., a corporation, defendant in the above-entitled cause, and moves this Court for an order setting aside the decision and judgment herein and granting a new trial of the above-entitled cause for the following reasons, viz:

I.

Insufficiency of the evidence to justify the decision;

II.

That said decision is against law;

III.

Error in law occurring at the trial and excepted to by the said defendant.

IV.

Errors in law occurring at the trial and excepted to by the said defendant.

This motion will be based upon all the files, records and minutes of the above-entitled court in said action and upon the court reporter's notes of the testimony offered therein.

Dated: July 31, 1953.

/s/ ALBERT PICARD,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 1, 1953.

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION FOR NEW TRIAL

Good Cause appearing therefor, it is

Ordered that defendant's motion for a new trial herein be and the same is hereby denied.

Dated: August 7, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed August 7, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that West Coast Products Corp., a corporation, defendant above named, hereby appeals to United States Court of Appeals for the Ninth Judicial Circuit, from the judgment entered herein on July 24, 1953, and from the order denying defendant's motion for a new trial entered herein on August 7, 1953.

Dated: September 3, 1953.

/s/ ALBERT PICARD,
Attorney for Appellant.

[Endorsed]: Filed September 3, 1953.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, West Coast Products Corp., a corporation, defendant herein, have prosecuted or are about to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered July 24, 1953, by the District Court of the United States for the Northern District of California, Southern Division.

Now, Therefore, in consideration of the premises, the undersigned, Fidelity and Deposit Company of Maryland, a corporation duly organized and existing under the laws of the State of Maryland and duly authorized and licensed by the laws of the State of California to do a general surety business in the State of California, does hereby undertake and promise on the part of West Coast Products Corp., a corporation, appellant, that they will prosecute their appeal to effect and answer all costs if they fail to make good their appeal, not exceeding the sum of Two Hundred Fifty and no/100 Dollars ($250.00), to which amount said Fidelity and Deposit Company of Maryland acknowledges itself justly bound.

And further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the court in the above-entitled matter may, upon notice to the Fidelity and Deposit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in

which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Signed, Sealed and Dated this 3rd day of September, 1953.

[Seal] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

By /s/ ERBON DELVENTHAL.
Attorney-in-Fact.

Attest:

/s/ S. CLIMO,
Attesting Agent.

State of California,
City and County of San Francisco—ss.

On this 3rd day of September, A. D. 1953, before me, Belle Jordan, a Notary Public in and for the City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Erbon Delventhal, attorney-in-fact, and S. Climo, agent, of the Fidelity and Deposit Company of Maryland, a corporation known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney-in-fact and agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said

Fidelity and Deposit Company of Maryland thereto as principal and their own names as attorney-in-fact and agent respectively.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco the day and year first above written.

[Seal] /s/ BELLE JORDAN,

Notary Public in and for the City and County of San Francisco, State of California.

My commission expires November 9, 1956.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DESIGNATE CONTENTS OF RECORD UNDER RULE 75A

For good cause appearing, it is hereby ordered that plaintiff, Southern Pacific Company, have to and including September 25, 1953, within which to designate contents of record on appeal herein.

Dated this 18th day of September, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed September 18, 1953.

In the Southern Division of the United States District Court for the Northern District of California

No. 29726

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff,

vs.

WEST COAST PRODUCTS CORPORATION, a Corporation,

Defendant.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT
May 11, 1953

Appearances:

F. E. FUHRMAN, ESQ., and
A. T. SUTER, ESQ.,
For the Plaintiff.

ALBERT PICARD, ESQ.,
For the Defendant.

The Clerk: Southern Pacific Company versus West Coast Products Corporation, trial by jury.

Mr. Fuhrman: Read for plaintiff.

Mr. Picard: Ready for the defendant, your Honor.

The Court: Gentlemen, I have looked at the file

in this matter and I have some doubt as to the jurisdiction of this Court.

Mr. Fuhrman: If the Court please, I believe that the Court has jurisdiction by reason of the fact that this is a matter arising under the Interstate Commerce Act concerning interpretation of the act.

The Court: Well, the amount involved is about $1,400. The jury has been summoned here. The ordinary jurisdiction of this Court is $3,000. It is true, though, there is a section that has been in some instances construed if the action involves the procedure under the commerce act the jurisdictional not being present, but I never heard a suit just to recover an ordinary freight rate to be filed in the United States Court. If that was so, whenever somebody didn't pay their tickets of $75 from here to Chicago, the railroad could sue to collect it in the federal court. .I don't think any decision has gone that far. Has it? It is true in the regulatory practices——

Mr. Fuhrman: I don't know whether the cases go so far as giving the specific illustration just presented.

The Court: I think that there ought to be—if there is [2*] some case that holds that suits to collect freight bills and passenger traffic charges can be brought in federal courts no matter what the amount involved is, why, of course, that might be pretty persuasive. But the only cases I heard of or noticed in the books are those that involved some regulatory practices of the commerce statute where the reason for the exemption is that it has to do

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

with the enforcement of the regulatory rules with respect to commerce.

Mr. Fuhrman: Well, your Honor, I think I am fairly well familiar with a number of these cases that have come before the federal courts and frankly I don't know of any case at the moment which touches upon the jurisdictional question. I had assumed that since this was an action under the Interstate Commerce Act, a federal statute, that the federal court had jurisdiction as a result without regard to any amount. There are numerous cases which have gone to the Supreme Court of the United States—I am not sure at the moment whether they started in the federal court, but I do know of cases that have been brought in the federal court consistently without the question of jurisdiction having been raised, and I don't believe there is anything in the statute which sets any amount as limiting the Court's jurisdiction.

The Court: Well, there are a number of cases that involve the recovery of penalties under the statute of commerce regulation, and I have heard some, and I think the Supreme Court [3] decided that suit for tariffs under certain provisions was properly brought in the district court, even though the ordinary jurisdictional amount was not present, but I never have heard of a case brought in the U. S. court just to collect ordinary freight charges. If that were true——. Although it doesn't arise because the railroad company requires passengers to pay for their tickets in advance. But if it is true in principle, if I bought a ticket to Chicago

for a hundred and some odd dollars and I didn't pay for it, for some reason or other, the railroad company could sue me in the federal courts because it involves interstate commerce.

I don't know if there is any case that precisely held that.

What prompts my inquiry is that I don't think the parties have got any business taking up the time of the federal court when there is the matter of jurisdiction and all that is involved—whether the freight has been paid or not. The state court is available. It costs the United States to bring a panel of jurors here, it costs the United States over $200 just to bring the jurors here for one day, not counting if the case went any more than one day, to try a case involving $1,400. If I could find any way to send it in to the state court, I would do so, very frankly. I am not saying that particularly to the plaintiff or to the defendant. I assume you brought it here because you thought maybe you should bring it here. But the jury has been summoned and it is an unnecessary [3A] expenditure of time and effort and money of the United States in a civil proceeding, in my view. It does not involve the jurisdictional amount as we ordinarily understand it.

Mr. Fuhrman: May I say this, your Honor, this is one of about eight cases brought by the railroads in each of which I feel there is involved substantially the same question. The total charges are approximately $25,000. One action was brought about two years ago before this court and resulted

in judgment for the plaintiff, and as a result of that the defendant (who is the same defendant, and was the same defendant in another action) paid the charges, and another action was subsequently brought in the state court by another railroad and that was decided adversely to the railroad. It was felt when the first case was brought before this court involving a substantial sum of money in the aggregate that that would decide the issue for all of the case (at least I felt that way and certainly the attorney for the defendant, the same case, thought the same way in another action by another party).

The Court: If there is a question of law, yes. But if it is a question of fact, assuming that here is a jury summoned, that all there is going to be involved in this case is a question of fact, otherwise there wouldn't be a jury here, so I don't know how that would be in any way decisive of the other cases. Assuming there is something about olives and the question is if there is going to be a question of fact, [4] what was the character of the olives, if it is a question of fact that is involved, in the next case how do you know if you have the same question of fact?

Mr. Fuhrman: It is my position that it is a question of law primarily involved here as to which of two tariffs apply, and that is a question of law, and because of that thought I filed a motion for summary judgment in this action but Judge Roche felt that because there was a difference in the man-

ner in which the olives in this case were processed it would make a difference from a factual standpoint, but I argued that it was a question of law involved as to which of two tariffs apply.

And, furthermore, the plaintiff in this action did not request a jury. I can see no reason for a jury, and because of my own position——

The Court: Is there some dispute as to the manner in which the olives were processed?

Mr. Fuhrman: No, absolutely none. We agree entirely with the manner in which they were processed. There are two tariffs involved here and we are seeking to apply one or the other of these tariffs to these particular shipments. We tried one case and it is conceded that it was a different method of processing, but the end result was the same, and in my opinion this case should go along with that previous case. Judge Roche——

The Court: Mr. Picard, do you say there is any question of [5] fact involved?

Mr. Picard: If your Honor please, may I first—so that the matter is formally before the Court—at this time move that the action be dismissed upon the ground that this Court has no jurisdiction of the subject matter of the action, the amount being involved being less than $3,000.

The Court: Well, on the other question——

Mr. Picard: On the other question, if your Honor please, in my opinion it is a question of fact. Counsel endeavored to make the same argument, which counsel is making to your Honor, before Judge Roche, the judge who tried the other case

which was decided in his favor, and Judge Roche denied his motion for summary judgment.

I think since this complaint was drawn and since we have gone into this matter more thoroughly, counsel has somewhat changed his views on this matter, although he seems to still persits in them. His complaint was drawn upon the theory solely that these were salt cured olives and that therefore he was entitled to recover the greater rate.

Now the tariffs do not read that way, your Honor. The tariff for the lower rate which was actually charged by the——

The Court: Mr. Picard, I don't want to interrupt you, but I don't think this is the proper time to argue the matter. All I am trying to inquire about is whether irrespective of whether or not—irrespective of Judge Roche's action on the [6] motion for summary judgment, which presents only the question as to whether or not the matter can be decided in the summary manner—that is all it decides——.

Now, if it develops that there is nothing for the jury to decide in this case as a factual matter, the case would still be tried before the Court without a jury and that matter resolved. All I am trying to find out is whether it is necessary to keep the jury here in this case at the expense involved if the parties themselves are in agreement as to the facts as to what happened but are in dispute as to which tariff applies.

Mr. Picard: Well, it seems to me, if your Honor please, and that is why I asked for a jury, that it

is a factual matter and that is what I was endeavoring to explain to your Honor when your Honor said you didn't want me to argue the matter.

The Court: You were arguing about the theory of the case.

Is there a question of fact as to the type of this commodity?

Mr. Picard: If your Honor will bear with me for just a moment, I think I will show you there is. In my opinion there is.

The Court: You say there is?

Mr. Picard: I think so, your Honor. I think, if your Honor please, your Honor's point is good.

Mr. Fuhrman: Your Honor, may we make this suggestion, we took the deposition of the officer of the defendant prior to [7] this trial and the purpose of this was to dispose of this case. And to show how I feel about the facts, I am willing to accept every statement of fact made in the defendant's deposition and have the Court apply those facts to one or the other of the two tariffs which are involved in the case.

Now that is the defendant's own statements of what the factual situation is, and that is how I feel, there is no issue as to the fact. It is just a question of which one of the two tariffs apply to those facts.

Mr. Picard: Without waiving the point, if your Honor please, that your Honor's original point is good, that this action should be dismissed for lack of jurisdiction, the question here is just one ques-

tion and that is whether these olives were preserved in liquid, and I think that is a question of fact.

The Court: Well, counsel says he is willing to accept the defendant's statement of that.

Mr. Fuhrman: All of the evidentiary facts are included in the deposition, your Honor. It is just a question of whether—of what conclusions are to be drawn from those evidentiary facts and that would be a function for the Court in any event.

Mr. Picard: I don't know what counsel seeks to show, but I expect to show, your Honor, that the olives are actually preserved in juice. I expect to show also that for 25 years or more the plaintiff here has always charged this lower rate, the [8] rate which was originally charged against the defendant.

The Court: That does not raise any factual question.

Mr. Picard: That would be a question of law.

The Court: That would be a question of law. I am not trying to tell you to——. I am just going to find out whether or not it is necessary to—if there is any fact for the jury to pass upon now. There is no use in keeping them here if there isn't. If there is nothing but a question of law to pass upon, I wouldn't submit it to the jury, anyhow; and if I did submit it to the jury and there was no factual basis for the decision, I wouldn't let it stand, anyhow, if it is only a question of law involved.

The presence of the jury isn't going to add any-

thing to the case if there is no factual question involved. That is all I am trying to find out.

The question then that is to be determined is whether the olives were or were not preserved in juice or liquid other than alcoholic, that the rate you would charge is under an item which applies to olives preserved in juice or syrup or liquid other than alcoholic. The rate for which they contend is for olives salt cured, not preserved in juice, so the question of fact is whether they were preserved in juice or not? What do you say to that? Is that the question of fact?

Mr. Fuhrman: If you want to call it a question of fact. But we have the facts in the deposition, which we are willing [9] to agree to, your Honor. They are evidentiary facts as to the manner of the processing, the manner in which they were shipped, and then the only other question involved is this, does tariff A and tariff B apply to those facts?

The Court: That is a question of law. You say you are willing to accept the statement of defendant as to the manner in which the preservation of the olives——

Mr. Fuhrman: The manner in which they were processed and shipped.

The Court: If the defendant's testimony in that regard is accepted by the plaintiff, is there any question of fact?

Mr. Picard: Let us concede that there is no dispute on how the olives are processed, which counsel says, than is it a question of fact or is it a question of law to determine whether those olives are pre-

served in juice or not preserved in liquid, preserved in liquid or not preserved in liquid; wouldn't that be a question of fact?

Mr. Fuhrman: The evidentiary facts speak for themselves, your Honor. There is just the conclusion to be drawn from those evidentiary facts.

Mr. Picard: I thought it was a question of fact, your Honor. That is why I asked for a jury.

The Court: What would the jury decide, whether something is a liquid or is not a liquid?

Mr. Picard: Whether they are processed in liquid or not— [10] whether they are preserved in liquid or not preserved in liquid. That is the question involved in the case.

The Court: The defendant's deposition was taken. Is he to testify in this case?

Mr. Picard: They asked that I produce him. I would have brought him, anyway. He is the man who is in charge of the processing of the olives at the defendant's plant, your Honor. I haven't heard anything——

The Court: You are not willing to stipulate that the case be tried before the Court without a jury?

Mr. Fuhrman: I am willing to make that stipulation, your Honor.

Mr. Picard: Well, let me speak to my client.

The Court: You speak to him. All I am interested in is just saving unecessary expense in the matter. That may be only a question of law and in this case there is only involved a small sum of money.

(Discussion off the record between counsel and client.)

Mr. Picard: They do not wish to waive a jury.
The Court: All right, call the roll of jurors.

(Thereupon a jury was duly impaneled and sworn.) [11]

Opening Statement on Behalf of Plaintiff

Mr. Fuhrman: If the Court please, ladies and gentlemen of the jury, as you have already surmised, this case is about olives.

Some years ago, back in 1948, 1947, at or about similar dates, the defendant corporation, which is located at Orland, California, shipped four carloads of olives over the lines of Southern Pacific Company and connecting carriers, two carloads to New York, one to Cleveland, one to Buffalo.

I don't know whether you people are familiar or not with what you prepare when you ship anything on the railroad. You prepare a bill of lading. It is a document made up in several copies and the person who has the product to ship prepares this document. He lists what he has got on there.

The controversial item in this case on the bill of ladings that were prepared by the defendant are coated olives and olives called oil-cured olives in There were several hundred kegs of these olives in these four carloads. That's all he said about oil-cured or oil-coated olives.

There were also other kegs of different kind of olives in there, such as olives in brine.

Now these bills of lading and freight carloads

of olives were presented to our agent at Orland. He took these bills of lading. He looked at the description. He wasn't clear from the information that was on the bill of lading which rate [12] applied. So he applied the lower rate.

Later on it developed, in a very thorough investigation, very careful consideration of all of the facts, that a higher rating applied to these olives, by reason of the fact in which they were prepared and packed.

The two descriptions that will be before you in this case are as follows. These descriptions are in the tariffs of the railroad on file throughout the United States with the Interstate Commerce Commission and the Public Utilities Commission. Everybody is bound by a tariff. It is just like a law. Whether you know it or not, you are bound by it; in order to conduct any reasonable semblance and normality of business, that has to be the situation.

One description was as follows:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

The other description:

> "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

From those two words that I gave you that were written on the bill of lading, the agent could not tell which description applied. To be on the safe side, in the first instance, he charged them the lower rate.

The Court: Which was the lower rate?

Mr. Fuhrman: The lower rate was olives canned or preserved [13] in juice or in syrup or liquid other than alcoholic. That is the rate that was charged. That was the rate that was prepaid on these carloads.

Later on, it developed that the higher rate, from the nature of the commodity, should have applied.

We asked the defendant to pay these additional charges. We submitted freight bills. He refused to pay them. This lawsuit resulted.

You may wonder why we sue a customer. It is bad business to sue your customers. You are going to lose future business. That may be true, ladies and gentlemen, but the railroads are bound by the provisions of the Interstate Commerce Act, and for those of you who are not familiar with that act, it was designed originally to correct the abuses that shippers and the railroads engaged in in the early days of railroading in this country. Sometimes the railroad would discriminate by a freight rate in favor of one person as against another. They would charge one man less for shipping the same commodity than they did another man for shipping the very same commodity.

Well, as you can see, if you can get a cheaper freight rate than your competitor, you will soon have a vicious weapon that you can use against your competitor in any business. Those of you who are in business will understand that. The act was designed to prevent discrimination among shippers or receivers of freight. Everybody has to be

charged the same rate, regardless [14] of whether or not they think it is reasonable.

It is for that reason we filed this lawsuit. We know that the law requires us to collect the applicable freight charges on any given movement. We believe that the olives oil-cured or oil-coated in this case properly fell under the description "Olives salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

The Court: Do you wish to make a statement at this time?

Mr. Picard: I would like to make a statement at this time, your Honor.

Opening Statement On Behalf of the Defendant

Mr. Picard: May it please your Honor, you, ladies and gentlemen of the jury, our defense in this action is that the rate which was actually charged by the railroad company under the designation which was given of the olives, this oil-cured or oil-coated, is the proper charge and that the railroad company is not now entitled to seek any further amount.

We will show you exactly how these olives are handled. We will show you that all of the salt was completely cleaned and washed off these olives, that they were then manipulated and a quantity of olive oil was used in such manner that every olive was oil-coated and that was done for the purpose of preserving the olives, and the olives were therefore preserved in a liquid other than alcoholic. [15]

We will show you that when they are put in the

barrels, through the reaction of the olive oil and the juice in the olive itself, a liquid forms which covers about one quarter to one-third of the barrel or keg in which they are shipped and that therefore they are actually preserved in liquid.

We believe that you will find that there was no mistake made by the station agent, that there was no doubt in the mind of the station agent because this type of olives have been shipped for more than 25 years, and this lower rate, the rate which was actually charged by the railroad company, is the rate which was always charged by the railroad company for this type of olives and is the proper charge which should be made for them.

Counsel has read you the two items of the tariffs which are here in question and, eliminating the unnecessary parts of it, I think this case resolves itself to a very simple question of fact, and that is were the olives, here in question, preserved in juice or liquid? I think that is the only question that is before you.

The one tariff which we claim is applicable here provides for olives "canned or preserved in juice or syrup or liquid other than alcoholic." In other words, the essential there is that they were preserved in juice, syrup, isn't applicable here. In juice or liquid other than alcoholic. Certainly olive oil is the liquid other than alcoholic. Certainly the [16] juice of the olive itself is a liquid other than alcoholic. Therefore, if you find that the olives in this case were preserved in juice or olive oil and they were all coated with olive oil for the pur-

pose of preserving them, then you must necessarily find that the lower tariff, the charge which was actually made, is a proper charge.

In order that the plaintiff can sustain its position in this case, the burden of proof is upon the plaintiff to prove that these olives were not preserved in liquid. In other words, if they were preserved in juice, if they were preserved in olive oil, if the coating of them in olive oil was a preservation, we believe that you will necessarily find that the plaintiff is not entitled to recover in this action and that the defendant is entitled to a verdict at your hands.

Thank you.

Mr. Fuhrman: I think at the outset I would like to read in evidence the Request for Admissions and the answers thereto.

The Court: The plaintiff's Request for Admissions?

Mr. Fuhrman: To the defendant, your Honor.

The Court: And the defendant's answers thereto?

Mr. Fuhrman: Yes.

Request for Admissions—if I may explain very briefly—are a set of questions that are prepared by any party to the case under oath and submitted to the other side, and they have to answer them under oath as well. [17]

In this case the plaintiff, Southern Pacific Company, prepared a set of questions under oath and submitted them to the defendant, who answered them under oath.

"Request for Admissions. The plaintiff, Southern Pacific Company, requests the defendant, West Coast Products Corporation, within ten days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial.

"That each of the following statements is true:

"1(a) That on or about March 8, 1948, at Orland, California, defendant tendered to plaintiff car PA 104387 containing olives for shipment to New York, New York."

The defendant admitted that was true.

"1(b) That Exhibit A attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 1(a)."

The defendant admitted that was true.

"1(c) That the document described in paragraph 1(b) was signed on behalf of the [18] defendant by H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of defendant."

Defendant admits the truth of that statement.

"Statement 1(d):

"That the facts stated in the said Exhibit A are correct."

Exhibit A is a copy of a bill of lading, which you may look at later in the case.

> "1(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit A."

The defendant admitted the truth of that statement.

> "2(a) That on or about March 17, 1947, at Orland, California, defendant tendered to plaintiff car Wabash 86233 containing olives for shipment to New York, New York."

Defendant admitted the truth of that statement.

> "2(b) That Exhibit B attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 2(a)."

The truth of that statement was admitted.

> "2(c) That the document described in paragraph 2(b) was signed in behalf of the defendant by H. L. [19] Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant."

Defendant admitted the truth of that statement.

> "2(d) That the facts stated in the said Exhibit B are correct."

Defendant admitted the truth of that statement.

> "2(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit B."

The defendant admitted the truth of that statement.

"3(a) That on or about April 6, 1949, at Orland, Califoria, defendant tendered to plaintiff car T&NO 59444 containing olives for shipment to Cleveland, Ohio."

The defendant admits the truth of that statement.

"3(b) That Exhibit C attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 3(a)."

The defendant admitted the truth of that statement.

"3(c) That the document described in paragraph 3(b) was signed by A. P. Paoni, per S.A.K.; that the said party who signed the said document was at said time of signing a duly authorized [20] representative of the defendant."

The defendant admitted the truth of that statement.

"3(d) That the facts stated in said Exhibit C are correct."

The defendant admitted that one, too.

"3(e) That the plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit C."

The defendant admitted that.

"4(a) That on or about April 7, 1949, at Orland, California, defendant tendered to plain-

tiff car SP 81989 containing olives for shipment to Buffalo, New York."

Defendant admitted the truth of that statement.

"4(b) That Exhibit D attached hereto is a correct copy of the shipping order copy of the bill of lading covering the shipment described in paragraph 4(a)."

That is admitted by the defendant.

"4(c) That the document described in paragraph 4(b) was signed in behalf of the defendant H. L. Krackov; that the said H. L. Krackov was at said time of signing a duly authorized representative of the defendant."

Defendant admits that, too. [21]

"4(d) That the facts stated in the said Exhibit D are correct."

That is admitted by the defendant.

"4(e) That plaintiff and its connecting carriers completed its contract of carriage as directed by defendant in Exhibit D."

That is admitted by the defendant.

"5(a) That the amount of freight charges collected by plaintiff for transportation of shipment in car PA 104387 was $938.18 including tax."

That is admitted by the defendant.

"5(b) That the amount of freight charges

collected by plaintiff for transportation of shipment in car Wabash 86223 was $943.72 including tax."

Defendant admitted that.

"5(c) That the amount of freight charges collected by plaintiff for transportation of shipment in car T&NO 59444 was $1061.37 including tax."

Defendant admitted that.

"5(d) That the amount of freight charges collected by plaintiff for transportation of shipment in car SP 81989 was $1028.86 including tax." [22]

That was admitted by the defendant.

"6. That the freight charges referred to in paragraphs 5(a), 5(b), 5(c) and 5(d) were assessed and computed on the basis of a rate provided in Item 3800 of Trans-continental Freight Bureau Eastbound Tariff No. 3-S for commodities described as:

'Olives, canned or preserved in juice, or in syrup or liquid other than alcoholic.' "

"7. That Item 5670 of Trans-continental Freight Bureau Eastbound Tariff No. 3-S provides straight rate which is applicable to shipments moving from Orland, California, to eastern destination described as:

'Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails.' "

Now the defendant admits 6, he admits the last one, 7, subject to qualification—that I will explain later.

> "8.(a) That freight charges on the shipment in car PA 104387, covered by shipment document identified as Exhibit A, computed on the basis of the rate referred to in Paragraph 7 herein, are the sum of $1304.66."

That was admitted, and with the qualification that I will [23] explain later.

> "8(b) That freight charges on the shipment in car Wabash 86233, covered by shipping document identified as Exhibit B, computed on the basis of the rate referred to in paragraph 7 herein, are the sum of $1312.36."

He admits that, too, with the qualification.

> "8(c) That freight charges on the shipment in car T&NO 59444, covered by shipping document identified as Exhibit C, are in the sum of $1403.82, and in computing the said sum the rate referred to in pargraph 7 herein, was applied to the 100 kegs of oil-cured olives in said car."

He admits that, too, subject to the qualification.

> "8(d) That freight charges on the shipment in car SP 81989, covered by shipping document identified as Exhibit D, are in the sum of $1,426.80, and in computing the said sum the rate referred to in paragraph 7 herein, was applied to the 105 kegs of oil-cured olives in said car."

He admits that, too, subject to qualification.

> "9. That if the freight charges as computed in 8(a), (b), (c) and (d) above apply to the movement of said four freight cars, then the defendant owes to the plaintiff the sum of $1,-475.51 [24] for freight charges and $44.26 federal tax on said sum of freight charges."

He admits that, too, except that he makes the statement—I should say the defendant corporation, rather than he, admits that also, except that he makes a further statement, as he had this morning before us all, that he contends that the freight rate on the olives preserved in liquid applies and not the rate on olives salt-cured and not in liquid.

Shall I offer them physically in evidence or shall I——

The Court: You can offer the answers and the documents as exhibits, if you wish to.

Mr. Fuhrman: I think I will do so. I offer them.

The Court: No objection?

Mr. Ricard: No objection.

The Court: All the answers and the documents attached will be admitted in evidence.

Mr. Fuhrman: Call Mr. Paoni.

AMADEO PAONI

(Thereupon Amadeo Paoni, an adverse witness called by the plaintiff, was duly sworn and testified as follows:)

The Clerk: Please state your name to the Court and to the jury.

A. Amadeo Paoni.

Mr. Fuhrman: I would like the record to show that Mr. Paoni is being called as an adverse witness. [25]

Direct Examination

By Mr. Fuhrman:

Q. Mr. Paoni, do you recall back on August 7, 1952, when your deposition was taken in the presence of Mr. Suter and Mr. Picard before a notary public and a reporter A. I do.

Q. Do you remember at that time that you were asked questions under oath and that you gave your answers thereto? A. Yes, sir.

Q. Mr. Paoni, the olives called oil-cured or oil-coated that were in the four carloads of olives involved in this case were Mission olives, were they not? A. Yes, sir.

Q. And they were ripe olives?

A. Yes, sir.

Q. When you first received those olives, that was some time generally in the month of December, isn't that right? A. Yes, sir.

Q. The first thing you do with them is run the olives through a grader, is that right?

(Testimony of Amadeo Paoni.)

A. Yes, sir.

Q. Why do you run them through a grader?

A. For size and to take out the olives that are bad.

Q. You wash them, get off the dust and dirt?

A. Wash them to take off the dirt and dust. [26]

Q. And you put them in a wooden bin, don't you? A. Yes, sir.

Q. Is that bin about six by six by five feet?

A. About.

Q. What else do you put in the wooden bin with the olives? A. Salt, rock rock.

Q. Rock salt? A. Yes, sir, rock salt.

Q. You first put a layer of olives, do you?

A. Yes, sir.

Q. About how thick is that layer?

A. About four, five inches.

Q. Then you put a layer of salt on that?

A. Yes, sir.

Q. How much salt? A. About one inch.

Q. Then some more olives and more salt?

A. Correct.

Q. Until you get up to the top?

A. Correct.

Q. It is my understanding that you leave those olives in it, together with the salt, for a length of time—it depends upon the weather, is that right?

A. Right.

(Testimony of Amadeo Paoni.)

Q. And what is the shortest length of time you leave the [27] olives and the salt together?

A. Three or four weeks.

Q. What is the longest time that you might leave it together?

A. Five or six weeks.

Q. What determines how long you leave the olives and the salt together?

A. Pardon me?

Q. What determines how long you will leave the olives and the salt together?

A. Well, the salt extracts the water from the olives—extracts the water from the olives and the juice from the olives and the salt together.

Q. Just a minute now. I don't think you understood my question. What determines whether you leave them in there three or four weeks or a longer period of time?

A. It depends upon the weather.

Q. The weather, is that right? If the weather is dry, how long do you leave them there?

A. If the weather is dry, the salt doesn't dissolve in the water fast and it takes longer. If the weather is mildly wet, raining, the salt dissolves faster and it works in the olives much quicker.

Q. Now, when you take the olives out of the bin, you shake all the salt off?

A. Right. [28]

Q. You have a machine for that?

A. Yes, we have a machine.

Q. Is it an electric machine?

(Testimony of Amadeo Paoni.)

A. (No answer.)

Q. There is no longer any more salt on the outside of the olives?

A. No salt on the outside of the olives.

Q. Now you dip them in water, don't you, to clean them up?

A. We dip them in water because—we dip them in water, fresh water, to dissolve the salt completely.

Q. Then you spread them out on a table, don't you? A. Right.

Q. Then you put oil on them? A. Yes.

Q. Now, as I understand it, for about 100 pounds of olives, you will use half a gallon of olive oil, is that right? A. Right.

Q. You then put them on this table that rolls the olives around in this oil?

A. That's right, put all the olives. To get all the salt out of the olives, to get the salt in the oil.

Q. They get a coat of oil on the olive?

A. On every olive.

Q. How long does that take? A. Take?

Q. To roll them around on the table.

A. Well, five minutes to a keg.

Q. And a keg has about how many pounds?

A. 100 pounds.

Q. That is net? A. Net, yes.

Q. How much does the keg weigh, if you know?

A. The gross weight?

(Testimony of Amadeo Paoni.)

Q. Yes. A. With the keg only?

Q. Just the keg alone, without——

A. About 12 pounds.

Q. So the gross weight of the keg altogether would be 112 pounds? A. 112 pounds.

Q. Then you put the olives—you fill the barrel up with the olives, don't you? A. Yes.

The Court: That is after they have been rolled in the oil?

Mr. Fuhrman: Yes.

Q. Then you cap the barrel?

A. Yes, sir.

Q. What kind of a cap do you put on them?

A. To cover it, first put a layer of paper first, to keep the olives, so the olives don't go in contact with the wood, and [30] then we put a wood cover over that.

Q. Is it a wooden barrel?

A. Wooden barrel.

Q. Will you illustrate how high the barrel is?

A. About 22 inches.

Q. 32? A. 22.

The Court: Excuse me just a moment. I want to excuse the rest of the jurors.

(Thereupon those jurors called, but not selected were excused.)

Q. (By Mr. Fuhrman): Tell us again the size of that barrel?

A. It is about 22 inches high.

Q. Is that the long part of it?

A. The height of the barrel.

(Testimony of Amadeo Paoni.)

Q. How wide is it?

A. Oh, about 16 inches.

Q. 16 inches? A. Diameter.

Q. How far through is it, Mr. Paoni?

A. About 16 inches.

Q. I am a little confused about the size of that barrel, Mr. Paoni, because in your deposition you said it was 23 inches high and 52 inches in diameter.

A. I misunderstood. That is not correct. [31]

Q. So that we will have no doubt about it now, will you tell us what is right? A. Yes.

Q. What is right now?

A. 23 inches high, about 16 inches in diameter.

Q. 23 high? A. 23 high.

Q. Do you know about how much liquid is in the keg after you cap it and finish and get it ready for shipment?

A. Between the oil and the liquid that comes from the olives themselves, there is about six, eight inches on the bottom of the keg.

The Court: You don't put any liquid in the barrel?

A. No. The olives themselves have got liquid.

The Court: You take the olive after it has been rubbed around in the oil and put it in the barrel?

A. Yes, sir.

The Court: And then what liquid gets into the bottom of the barrel is deposited from the olives?

A. From the olives.

(Testimony of Amadeo Paoni.)

The Court: Is this witness competent to say that was the process that was followed with respect to these particular olives?

Mr. Fuhrman: Yes. I can qualify him further in that respect, and I intend to do so. [32]

Mr. Picard: I will stipulate that he is the man who is in charge of the processing of the olives with the defendant.

Q. (By Mr. Fuhrman): You are the vice president of the defendant corporation, are you not?

A. Yes, sir.

Q. So that after the barrels are capped and ready for shipment, there is about six or eight inches of liquid in the barrel? A. In the barrel.

Q. Those olives are not sold in California, are they, Mr. Paoni?

A. Well, they sell very little in California. I don't know. We only ship in the east. We don't sell any in California.

Q. What does the salt do to the olives?

A. Pardon me?

Q. What does the salt do to the olives?

A. Extracts water from the olives.

Q. Now, you also pack another kind of olives, don't you? A. Yes, sir.

Q. Is that a green olive?

A. Green olives.

Q. Now green olives, you clean them up the same way you do the ripe ones? A. Yes, sir.

Mr. Picard: Before counsel goes into this sub-

(Testimony of Amadeo Paoni.)

ject, I don't think that green olives subject is relevant here, your Honor, [33] because we are dealing only with the type of olives that have been fully described by the witness.

The Court: You mean that is all that was involved in the shipments?

Mr. Picard: The only olive that is involved in the shipment, the only olive in question here, the only olive upon which they seek any righer rates.

Mr. Fuhrman: I think it is admissible, on two grounds, and quite relevant to the matter, because it illustrates another method of packing olives, a method that properly falls under one rate whereas we contend the other method illustrates the other rate. Not only that, these kinds of olives were included in this shipment, in some of these carloads.

The Court: Well, you are in dispute as to whether there were green olives in the shipment?

Mr. Fuhrman: No, there is no dispute.

The Court: I will overrule the objection.

Mr. Fuhrman: Now these other olives, after you clean them up——

The Court: These other olives—you are now referring to green olives?

Mr. Fuhrman: Green olives.

Q. (By Mr. Fuhrman): You understand me don't you? A. Yes.

Q. I don't want to confuse you. [34]

A. I understand.

Q. You put them in a vat, don't you?

A. Yes, sir.

Q. How large is the vat?

(Testimony of Amadeo Paoni.)

A. About six feet by six feet and by five.

Q. Similar to the other size one?

A. The only thing, it is cement, The other one is a wooden bin.

Mr. Picard: May it be stipulated that the objection which I made to the previous question may be deemed to have been made to all questions along this line?

The Court: With respect to the green olives?

Mr. Picard: Yes.

The Court: Very well.

Mr. Picard: They are not part of this action at all.

The Court: Very well. The record will show that.

Q. (By Mr. Fuhrman): Now, in this other bin with the green olives, you put a brine solution?

A. We make a brine solution, water and salt, before we put the olives in.

Q. What is brine, Mr. Paoni? What is brine? Explain what brine is.

A. Brine is the salt diluted in water.

Q. And when you start out, you start out with how big a solution? [35]

A. Well, about 15 degrees by salinometer.

Q. What do you end up with?

A. End up with 30 degrees.

Q. What is a salinometer?

A. That is what you measure—a salinometer is something to give the test, the strength of the brine.

Q. What kind of salt do you use there?

(Testimony of Amadeo Paoni.)

A. Rock salt.

Q. Now you keep them in there, in this liquid solution about two to three months, do you not?

A. Yes, sir.

Q. As a matter of fact, you never take them out of that, do you? A. No, sir.

Q. And you ship them in that same solution?

A. The same solution, the same brine. The same brine.

Q. These olives that are in this brine solution, in the barrel of the brine, the brine comes up to the top of the barrel, doesn't it?

A. Will you repeat it?

Q. I say, when you pack these green olives in the brine in the barrel, the solution, the brine comes up to the top of the barrel, doesn't it?

A. Yes.

Mr. Fuhrman: I would like to offer the deposition, your [36] Honor, into evidence.

The Court: Well, you have got him here as a witness.

Mr. Fuhrman: Very well. I believe that is all, Mr. Paoni.

The Court: Just a moment, Mr. Paoni.

Cross-Examination

By Mr. Picard:

Q. Now, Mr. Paoni, you have described to us that after the olives are taken out from the brine, or whatever you may call what you keep them in with the salt, you wash them; first you dry them, and then you wash them thoroughly, and then you

(Testimony of Amadeo Paoni.)

put them on a table and you have them manipulated with olive oil?

The Court: You are talking now about ripe olives?

Mr. Picard: The ripe olives. The ripe olives are the only olives in this case.

The Court: Just so there is no confusion.

Mr. Picard: Yes, your Honor. The ripe olives. I am talking about the Mission olives, the ripe olives.

Q. (By Mr. Picard): And you take them, put them on a table, and you manipulate them so that every olive is covered with oil? A. Right.

Q. What is the purpose of covering them with oil?

A. To keep the olives, to keep the olives so they don't get spoiled. If the olives are not covered with oil, they dry up and don't keep the flavor. It is to keep the olives. [37]

Q. That is to preserve the olives?

A. To preserve the olives.

Q. When the olives are put in the barrel, between the oil and the juice of the olives, you say a liquid forms?

Mr. Fuhrman: Just a minute. He didn't say anything of the kind, to my knowledge. I object to the question. It does not cover the evidence and it is leading.

Mr. Picard: That is why I asked him. I will ask him. I understood that is what he said.

Q. (By Mr. Picard): Now after you put the

(Testimony of Amadeo Paoni.)

olives in the barrel, after they have been coated with the oil—— A. Yes.

Q. ——you put them in the barrel and you cover the barrel. What happens?

A. The olives have got moisture in them that comes out from the olives mixed with the salt, and it makes the juice to preserve the olives.

Q. That is the juice of the olives in the olive oil that you coated them in? A. Olive oil.

The Court: You said to me that went to the bottom of the barrel.

A. Yes. The juice goes down to the bottom of the barrel.

The Court: You said it was about——

A. About six inches. [38]

The Court: About six inches, on the bottom of the barrel.

A. Yes.

The Court: From the olives, that was their liquid?

A. Yes.

Q. (By Mr. Picard): Well, if the barrel is turned, what happens to the juice?

A. Well, when the barrel is turned—they keep turning the barrels and the juice is still going up and down, you see, and it keeps water around the olives.

Q. So all the olives are preserved in the juice?

A. Because the, to take care of it keeps the barrels rolling and turning them over.

(Testimony of Amadeo Paoni.)

Mr. Picard: I have here a jar of olives, Mr. Paoni. I will ask that you tell us what that is.

Mr. Fuhrman: Just a minute, now. I am going to object to this jar at this time. I don't think it is proper on cross-examination. If you want to call him as you own witness later on. I called him as an adverse witness. I didn't examine him——

The Court: Apparently there is not much dispute as to the facts of the matter one way or the other, so I don't see the difficulty. The attorney has not yet laid a foundation for this as yet, so I don't see how to rule on it as yet. I can't rule on something until I really know where it is leading.

Mr. Fuhrman: Very well. I will withdrawn my objection. [39]

The Court: You say, "What is it"? Well, it is a jar of olives, I take it.

Q. (By Mr. Picard): What kind of olives?

A. These are oil-coated olives taken from the kegs that were shipped.

Q. Are these the type of olives that were shipped in the four shipments that are here in question?

A. Correct.

Q. And these are the olives upon which the Southern Pacific Company charged the lower freight rate?

A. That is the olives cured and shipped this way. Always cured and shipped this way.

The Court: Mr. Picard, bring out how he knows that. Did he take some part——

Mr. Picard: I think I'd better do that.

(Testimony of Amadeo Paoni.)

Q. (By Mr. Picard): What is your position with the West Coast Products Corporation, Mr. Paoni, other than being vice president, I mean?

A. I am a partner.

Q. Well, it is a corporation, so you are a stockholder? A. Yes, I am a stockholder.

Q. What do you have to do with the processing and the shipment of olives?

A. I supervise the processing.

Q. You supervise the processing?

A. Yes. [40]

Q. Now you described the process to us here this morning, principally in answer to questions from adverse counsel. A. Yes.

Q. Are you in charge of that processing?

A. Yes, I am in charge of the processing.

Q. And were the four carloads of olives which were shipped here and which are in question here processed, coated with oil, put in kegs and shipped in the manner you described this morning?

A. Correct.

A. And the olives you hold in your hands, are they olives which, to your own knowledge, were processed in the manner that you have described here this morning? A. Yes, sir.

The Court: How does he know that those are the olives that got in those barrels? Why don't you bring that out?

Mr. Picard: All right, your Honor.

Q. How do you know that this bottle that you are holding in your hand is the same type of olive?

(Testimony of Amadeo Paoni.)

A. Because I picked these myself from the kegs and brought them down to you.

Q. You took them yourself and brought them down to be offered in court? A. Yes.

The Court: You mean from these kegs, these very kegs that [41] were shipped?

Mr. Fuhrman: No.

Mr. Picard: I wouldn't say they were the very kegs that were shipped, your Honor.

The Court: Oh, I see what you are trying to do.

Mr. Picard: Similar.

Q. Do you process all your oil-coated or oil-cured olives in the same manner you described this morning? A. Yes, sir.

The Court: What do you do, take some of these olives—or what did you do, take some of these olives out of some of the kegs that were ready for shipment, and you took some of them out and you put them in these glass jars to bring them here today?

A. Yes, your Honor.

The Court: All right.

Mr. Picard: I will offer these olives, if your Honor please, this jar of olives, as defendant's Exhibit A, and I would like to exhibit them to the jury.

Mr. Fuhrman: I think I am going to object to it, your Honor. I don't think the proper foundation has been laid. I don't think it is material to the matter which has been presented.

Mr. Picard: The Court would like to see them, Mr. Paoni.

The Court: Well, I don't see what purpose would

(Testimony of Amadeo Paoni.)

be [42] served by seeing some olives that have been brought here, taken out of a——

Mr. Picard: I believe, if your Honor please, it is clear in looking at them that they are moist, that they are preserved in liquid.

Mr. Fuhrman: That is just a conclusion of counsel.

The Court: All I can do is look at them the way they are here.

Mr. Picard: I think that is the main thing for the jury to determine here, whether they are preserved in juice or liquid.

The Court: These are in the same condition as the ones in shipment?

Mr. Picard: The witness has so testified, your Honor, and he was in charge of processing these and he was in charge of processing those that were shipped. He has been in charge of all of the processing there.

Mr. Fuhrman: There has been no foundation laid as to time of processing at all, your Honor, or anything of that nature, your Honor. The foundation seems——

The Court: I think you would have to lay a little more foundation, perhaps, Mr. Picard, as to the manner—where these olives came from, what time, and so forth.

Q. (By Mr. Picard): Referring to the jar of olives which you now hold in your hand, Mr. Paoni, where did you bring these [43] from?

(Testimony of Amadeo Paoni.)

A. From our plant in Orland.

Q. When were these olives processed that you hold in your hand?

A. Processed last month, the month of March.

Q. In the month of March—and this is now the month of May.

Now, the olives which were shipped in the four carloads which are here in question, how long before they were shipped were they processed?

A. Well, about, we process and ship them in the time. I can't remember exactly how long before they were shipped.

Q. Was it approximately the same length of time before shipment as the length of time between processing and the——

A. Usually we ship around ten days' time, a car in ten days. It depends when they are ready for shipment, then we ship a car.

Mr. Picard: Does that satisfy your Honor?

Mr. Fuhrman: I don't even understand that last answer.

(Answer read back by reporter.)

The Witness: May I make it a little more clear, your Honor?

The Court: Yes.

A. Assume we have a car ready, and we have a quantity enough, we ship. If we have an order to ship them and don't have enough, we mix with the shipment other olives to make up the [44] car. We don't keep it any longer.

Q. (By Mr. Picard): Did you hold these, those

(Testimony of Amadeo Paoni.)

in the jar in your hand, the same length of time as the other olives which you shipped in the four carloads in question?

A. Well, I couldn't say that. More or less, yes.

Q. Would a few days more or less make any difference in the olives in their appearance?

A. It doesn't make any difference because the olives——

Mr. Fuhrman: I object to that.

A. ——processed this way, you can keep them for a year.

Mr. Picard: Just a second.

Mr. Fuhrman: I am going to object to the question and move to strike the answer, so far as it is in the record. I think he has called for a conclusion on the part of Mr. Paoni without laying any foundation for it. He called for whether two or three days would make any difference. I don't know and I am sure the jury doesn't know, and I don't think there is any foundation for their conclusion as yet.

Mr. Picard: This man is an expert, your Honor.

The Court: Overrule the objection.

Q. (By Mr. Picard): Now you can answer it. Start all over again. You remember my question?

A. No.

(Question read back by Reporter.)

Q. (By Mr. Picard): Did you want to go on with that or does [45] that complete it?

A. That's right.

Mr. Picard: I think the foundation has been laid.

(Testimony of Amadeo Paoni.)

The Court: Now, what do you want, to offer this in evidence?

Mr. Picard: Yes, as illustrative of the witness' testimony.

The Court: Because it is obvious that these are not part of the shipment.

Mr. Picard: No, your Honor. Illustrative of his testimony in conjunction with his testimony that they are the same as the olives that were shipped.

The Court: All right. Let them be admitted for that purpose.

The Clerk: Defendant's Exhibit A introduced and filed into evidence.

(Whereupon jar of oil-coated olives was received in evidence and marked Defendant's Exhibit A.)

The Court: Do you want the jury to look at them?

Mr. Fuhrman: Mr. Picard asked that they be——

Mr. Picard: Yes, if they will take them and pass them along.

(Whereupon Defendant's Exhibit A was examined by the jurors.)

The Court: You want them to take the cover off that? Did you want the cover removed so that they could look at it? [46]

Mr. Picard: Yes, I would like to have the cover removed, your Honor.

(Testimony of Amadeo Paoni.)

Now, if your Honor please, I would like to have the cover put on so the jury can tip the jar and see how the liquid forms.

The Court: I think you can take it for granted. Maybe I can hold it up to them so that they can see it.

(Court demonstrating with Exhibit A, turning jar upside down with cover on.)

Everybody see that?

Mr. Picard: That is all at this time.

Mr. Fuhrman: I have a few more questions.

Redirect Examination

By Mr. Fuhrman:

Q. Mr. Paoni, if you don't put olive oil on these olives, they will tend to shrivel up, won't they?

A. They are shriveled already.

Q. What is that?

A. They are already shriveled, when we take them out of the brine.

Q. Right. When you put olive oil on them, it takes some of the shriveling out, doesn't it?

A. No, sir.

Q. It does not. What instructions do you send with these olives regarding tipping the [47] barrels?

A. Will you repeat that?

Q. What instructions do you send with the Mission olives regarding turning the barrel?

A. We don't send any instructions because they know.

(Testimony of Amadeo Paoni.)

Q. They know. They know they have to be turned, and if they don't turn the oil doesn't get on the olives, does it?

A. If it isn't turned, the top gets dry.

Q. How often should they be turned?

A. Well, once a week, once every two weeks. It doesn't make much difference.

Q. You don't have to turn olives in brine, do you? A. No, sir.

Mr. Fuhrman: That's all.

Recross-Examination

By Mr. Picard:

Q. Mr. Paoni, one more question, if these olives that are here in question, the Mission ripe olives were not coated and preserved in olive oil, would they become moldy?

A. They dry and become moldy.

Mr. Picard: That is all.

(Witness excused.)

E. J. SWANSON

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name to the Court and to the [48] jury.

A. E. J. Swanson.

Direct Examination

By Mr. Fuhrman:

Q. What is your occupation, Mr. Swanson?

A. I am chief traveling inspector for Trans-Continental Freight Bureau.

(Testimony of E. J. Swanson.)

Q. What is the Trans-Continental Freight Bureau?

A. Well, we are a bureau that conducts investigations to determine the classification and rates of commodities shipped by freight to permit the proper assessment of freight charges.

Q. Is that bureau set up by all of the railroads in the United States?

A. There are several bureaus covering the entire United States. This one just covers six western states, but we serve all of the carriers in this area.

Q. How long have you been so employed?

A. Oh, about 15 years.

Q. Would you state in some detail what the type of work that you do encompasses, Mr. Swanson?

A. You mean the bureau or just myself?

Q. Yourself.

A. Well, I supervise all of the field forces and then I conduct express investigations wherever our regular representative has not been able to develop the necessary information.

Q. And what is the view that you have in mind when you conduct [49] these investigations, what is your purpose?

A. Well, to determine the correct description of the commodity to permit the carrier to assess correct freight charges in line with the tariff provisions.

Q. Now directing your attention to the copies of bill of ladings that I mentioned this morning. Did

(Testimony of E. J. Swanson.)

you hear me this morning mention them here in the court room? A. Yes, I did.

Q. Have you heard me mention the description "oil-coated, oil-cured olives"? A. Yes, sir.

Q. In that connection, is there anything at all in the tariffs, Mr. Swanson, requiring a certain kind of a description of a commodity?

A. Well, that is provided in Rule 2 of the freight classification. That is the basis on which we operate. Rule 2 provides that bill of ladings' description should conform to the provisions of freight classification and paragraph 2 of that rule reserves the right to carriers to conduct investigations to determine the proper description.

Mr. Fuhrman: I have to apologize to the Court. I think I passed out the wrong exhibit—and the jury, too.

Mr. Picard: I didn't hear what counsel just said.

The Court: He said he made a mistake in handing out the wrong exhibit. [50]

Mr. Picard: When you talk away from me, I can't hear you.

Q. (By Mr. Fuhrman): Continue, Mr. Swanson.

A. This rule 2—on page 132—this is a sheet from the consolidated freight classification. Section 1 provides that descriptions of articles in shipping orders and bill of ladings should conform to classification or tariff descriptions, and—"Section 2. Carriers reserve the right to inspect shipments

(Testimony of E. J. Swanson.)

where necessary to determine lawful ratings. When found to be incorrectly described freight charges must be collected according to proper description."

Mr. Fuhrman: I offer in evidence, your Honor, copy of Consolidated Freight Classification No. 17, Rule 2, which I have given copies to counsel and the witness. The exhibit is of the title page and the rule itself. Just the title page and the rule itself.

The Court: Who makes this rule?

Mr. Fuhrman: This rule is a part of the tariff—well, excuse me. Go ahead, Mr. Swanson, and testify. Where do you find this rule?

A. This is in the Consolidated Freight classification. These are the rules and regulations drawn up by the Interstate Commerce Commission.

The Court: Is it a rule of the Interstate Commerce Commission? [51] A. That is true.

Mr. Fuhrman: The witness said it was.

The Witness: That is true, yes.

The Court: All right. Well, I don't think we need to admit a rule of the Interstate Commerce Commission in evidence. We will take judicial notice of it—couldn't we, the same as we would any other statute?

Mr. Fuhrman: If your Honor please——

The Court: You wish it in evidence?

Mr. Fuhrman: Well, maybe the jury might want to refer to it. I don't think the jury would have anything to do with it—that is the province of the Court, telling the jury what the law is——

(Testimony of E. J. Swanson.)

The Court: Let it be deemed to be part of the record in the case.

Mr. Fuhrman: All right.

Q. In your work with the Trans-Continental Freight Bureau, did you at any time make a visit to the plant of the West Coast Products Corporation? A. Yes, I did, in April, 1949.

Q. And did you at that time inspect and talk to people concerning the manner in which these black Mission ripe olives were being packed?

A. Yes. I talked to a Mr. Krackov. I don't know just what his title or his position was. I assumed he was plant manager. [52]

Q. He was working there in the plant of the defendant? A. Yes.

Q. What were you advised as to the manner of preparing, packing of these olives?

A. Well, he told me they used various means of salt applications to cure the olives and then, as stated before, why, they are oil-coated and then placed in the kegs.

Q. In the manner in which—similar to which Mr. Paoni testified?

A. That's right. I saw the olives in the kegs at that time.

Q. As a result of your investigations, did you report your findings to the railroad?

A. Yes. I reported my findings to my office, who in turn transmitted it to the accounting department of the carrier involved.

Q. (Handing document to witness): Mr. Swan-

(Testimony of E. J. Swanson.)

son, I have just passed out four sheets of paper stapled together.

May I have it marked for identification?

The Court: Yes, mark it for identification.

The Clerk: Plaintiff's Exhibit 1 marked for identification.

(Whereupon document entitled "Trans-Continental Freight Bureau, Eastbound Tariff No. 3-S" page 87 there, page 412 thereof, and page 546 thereof, marked Plaintiff's Exhibit No. 1 for identification.) [53]

Q. (By Mr. Fuhrman): Would you tell us what that is, Mr. Swanson?

A. Well, it is the title page and a portion of Trans-Continental Freight Bureau Tariff No. 3-S, which contains the rates provided for various commodities moving from the Pacific Coast points to eastern territory.

Q. And does this Plaintiff's Exhibit 1 for identification contain description of—strike that—contain the two descriptions which are in controversy in this case? A. It does.

Q. Where is the description "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic" fall in this exhibit?

A. Well, that is in connection with canned goods.

Q. That is a canned goods description?

A. Yes.

Q. And where does the description "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails" fall?

(Testimony of E. J. Swanson.)

A. Well, that is an item specifically providing for olives, nothing else, and has to do with salt-cured olives not preserved in liquid.

Q. That is item what—5670? A. 5670.

Q. The other was item 125? [54] A. 125.

Mr. Fuhrman: I offer Exhibit 1 marked for identification in evidence.

The Court: All right. Admitted.

The Clerk: Defendant's Exhibit 1 admitted and filed into evidence.

(Whereupon Exhibit 1 marked for identification, previously described, was received in evidence as Plaintiff's Exhibit 1.)

Q. (By Mr. Fuhrman): Mr. Swanson, in the report which you sent in as a result of checking at the office of the West Coast Products Corporation, what did you say about these olives?

Mr. Picard: Object to that, if your Honor please, on the ground it calls for the conclusion of this witness.

The Court: Yes.

Mr. Picard: That is the very question to be determined here.

The Court: Sustained. The case has to be established or fall on the physical facts as to these olives, not what anybody says about them.

Q. (By Mr. Fuhrman): Did you find, Mr. Swanson, as a result of your investigation that the olives were packed substantiailly—I am speaking of

(Testimony of E. J. Swanson.)

the Mission olives now as Mr. Paoni testified to this morning——

A. Yes, just in that manner. [55]

Mr. Fuhrman: That is all.

The Court: Any questions?

Mr. Picard: Just a few questions.

Cross-Examination

By Mr. Picard:

Q. Mr. Swanson, there have been handed to you here what has been offered as Plaintiff's Exhibit No. 1 for identification, four pages. The first one is the title page of Trans-Continental Freight Bureau East-Bound Tariff No. 3-S. The next page that is handed is page 87. Nothing between there. Nothing between there and page 87. The part where you read is headed above "List of articles taking rates provided for canned goods, pickles and preserves in items making specific reference hereto."

And you come down to the words "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

There is no question that says olives, is there?

A. No.

Q. All right. Now from page 87 you have nothing in between here till you get to page 412, have you? A. That's right.

Q. All right. Now on page 412 you have again a heading "Canned goods, pickles, preserves and other articles as designated"—and I don't see anything that is used here that is on that page. [56]

(Testimony of E. J. Swanson.)

Now then, you skip again from page 412 to page 546 and under "General commodity rates" apparently you have a large number of different items on this page, you have a number 5670 which says, "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails," and then you have "orange meal," you have "ore," you have various others, but you haven't anything in between there, have you?

Mr. Fuhrman: Those are different items that you have referred to.

Mr. Picard: Possibly they are different items.

Q. In these pages that are here, the only two designations of olives that you have are "Olives, canned or preserved in juice or in syrup or in liquid other than alcoholic," and "Olives, salt-cured, not preserved in liquid," isn't that so?

A. That is true.

Mr. Picard: That is all.

(Witness excused.)

The Court: It looks to me that the question involved, so far, is very simple, a question whether these olives were preserved in liquid or not. That is all there is to the case, I don't know whether we will have to keep the jury very long, or whether you will put on any more testimony or not.

Mr. Picard: If that is the plaintiff's case, I would be ready to make a motion now, your Honor.

The Court: Did you have any more? [57]

Mr. Fuhrman: I may have one more witness after lunch.

The Court (To the jury): I have kept you here pretty long, and we have had a lot of interruptions. I think the jury is entitled to a lunch period now.

We will resume at two o'clock, members of the jury. Please come back at two o'clock, and don't discuss the case among yourselves as yet or form or express any opinion on it until we finally decide it this afternoon.

Please return at two o'clock.

(Whereupon an adjournment was taken until 2:00 p.m. this date.) [58]

Monday, May 11, 1953, at 2:00 o'Clock

The Clerk: Southern Pacific Company versus West Coast Products Corporation, on trial.

(The following proceedings were had within the presence of the jury.)

Mr. Fuhrman: I would like to call Mr. Herman Rempel.

HERMAN REMPEL

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Please state your name to the Court and to the jury?

A. Herman G. Rempel.

Direct Examination

By Mr. Fuhrman:

Q. Mr. Rempel, where do you live?

A. In Fresno, California.

Q. What is your business and occupation?

A. I am a chemist and food technologist.

Q. By whom are you employed?

A. Twining Laboratories, Fresno.

Q. What is your position with that company?

A. I am the chief chemist.

Q. Mr. Rempel, in your work do you belong to any scientific or professional organizations?

A. Yes, I do. I am a member of the American Chemical Society, [59] of the American Oil Chemists Society, member of the Institute of Food Technologists.

Q. Are you a chemical engineer within the State of California?

A. I am a registered chemical engineer.

Q. How long have you lived in Fresno?

A. For nearly 25 years.

Mr. Picard: What? I didn't hear that question.

Mr. Fuhrman: I asked how long he lived in Fresno. He said for nearly 25 years.

Q. As a food technologist, Mr. Rempel, are you

(Testimony of Herman Rempel.)

familiar with the processing of olives, food products? A. Yes, I am.

Q. In your work for the past few years have you worked with various types of processing of olives?

A. Yes, I have. I made very many analysises of olives and different products of the olive industry.

Q. You heard Mr. Paoni testify this morning concerning the Mission ripe olives in this case; did you hear his testimony? A. Yes, sir, I did.

Q. What do you call that kind of an olive?

Mr. Picard: Object to that, if your Honor please, upon the ground that the question involves not what you call olives but whether they are preserved in juice or liquid other than alcoholic, not with regard to what their names may be.

Q. (By Mr. Fuhrman): Is that type of olive, does it have a [60] trade name of any kind in the trade? A. Yes.

Mr. Picard: Same objection.

The Court: Well, I don't see any harm in that question. It may not have any—it may be preliminary of generally descriptive without being harmful in any way. I will overrule the objection.

A. They are generally referred to as Greek style olives, but sometimes they are called salt-cured and sometimes they are called oil-cured.

Q. (By Mr. Fuhrman): What study of olives have you made over the years? What have you done with olives?

(Testimony of Herman Rempel.)

A. Well, I have worked on the different products, the olives themselves, and I have been called in on various problems in connection with the processing of olives.

Q. Who have called you in, Mr. Rempel? Name some of the organizations.

A. Well, Pacific Oil Company, in Visalia; Oberti and Sons, Madera; and California Olive Oil Manufacturing Company, in Fresno; Lopopolo Olive Oil in Fresno.

Q. And are you familiar with the various processes that are used in the preparation of olives for market? A. Yes, I am.

Q. Will you describe them?

A. Well, most olives now are being canned. They are called [61] a ripe olive—canned ripe olive. A majority of the olives are processed in that manner.

Q. And what other methods are there?

A. There are also the Spanish type, which are green olives, which are also preserved in brine. Then the third one is salt-cured Greek style olives. And the fourth one, of which very little is being processed in California, is the Sicilian type, which is also processed in brine.

Q. In which category of the four that you have mentioned as to processing, do the olives that Mr. Paoni testified to, the Mission olives, fall in?

A. That is the one that is not processed in brine. It is the one that is processed in rock salt and it is referred to as the salt-cured or Greek style olive.

(Testimony of Herman Rempel.)

Q. When you use the words "salt-cured," what do you mean by curing, cured? What does that mean?

A. That means that the olives are preserved or kept from spoilage by a certain process and by salt-curing is meant that the salt is absorbed by the olive to such an extent that bacterial decomposition or fermentation with mold cannot take place.

Q. Is salt used as a curing agent with other foods, too? A. Yes, it is.

Q. You heard Mr. Paoni this morning testify that the salt is used to take the moisture out of the olives. Assuming that to [62] be the fact, once the moisture has been taken out of the olives by the salt and the olives are put in a barrel and after having been sprinkled with this oil, is there any other liquid that can come out of the olive into the barrel?

A. Most of the moisture will be drawn out by the salt until the moisture is reduced only 17 or 20 per cent, so that no more moisture can be drawn from the olives.

Q. So that any moisture that would be in the barrel, is it fair to say, would be the result of something that was left on the olives as a result of washing them before packing them?

A. That's right. It would be any free moisture which remains on the surface of the olives or some of the olive oil, excess olive oil, which may drain from the olives.

Q. When olives are cured by salt, as Mr. Paoni

(Testimony of Herman Rempel.)

testified to this morning, what is the process that happens to the olive itself, what goes on?

A. Well, it is a process of osmosis. There is strong salt solution in the outside. In other words, the rock salt will absorb a little bit of the moisture and it will be a very strong solution on the surface of the olive, and the inside of the olive will be water. So osmosis takes place. The water comes out and the salt goes in. The salt finally penetrates all the way to the pit and in that manner preserves the edible portion of the olive, all the way from the skin to the pit.

Q. Well, when those olives are washed at the end of the [63] processing procedure, does that salt that is in the olive come out of it or not?

A. No, only what little bit may adhere to the surface.

I have analyzed olives, Greek style olives, which had been washed and some that had not been washed, and the difference in the salt content is very small, only about half of one per cent out of eight to twelve per cent.

Q. Well, are olives cured with olive oil as a curing agent?

A. Well, olive oil alone will not cure olives. But after they have been salt-cured, then olive oil will help to inhibit mold growth on the surface of the olives.

Q. If you were to take a ripe olive off the tree, then not to do anything to it at all but simply coat it with olive oil, what would happen to that olive?

(Testimony of Herman Rempel.)

A. It would eventually spoil. Bacterial decomposition would set in and the olive would spoil.

Q. And comparing that to the olive that had a salt-curing beforehand, which one will last the longer?

A. The salt-cured olive contains enought salt to preserve it and to inhibit the growth of bacteria or bacterial decomposition of the olive itself.

Q. Considering a barrel of olives in brine, Mr. Rempel, and a barrel of olives packed, like Greek style olives are in this case, which barrel will have the most olives in it—strike that. [64]

If you have the same size barrels, which barrel would weigh the most, one that has the olives in brine or the one that has the olives packed, as Mr. Paoni testified to this morning?

Mr. Picard: I object to that as incompetent, irrelevant and immaterial. There is no question of that kind here.

The Court: Well, what are you getting at, there is some reason for the distinction in rate?

Mr. Fuhrman: Yes.

The Court: If you had a barrel the same size, one barrel of olives in brine and the other not, which one would be the heaviest, is that what you are saying?

Mr. Fuhrman: Yes.

The Court: Well——

Mr. Picard: Your Honor, I don't think that would make any difference because they limit the

(Testimony of Herman Rempel.)

cargo to 60,000 pounds, anyway, and 60,000 pounds of feathers would weigh as much as 60,000 pounds of lead. So whether there was a couple of more barrels or not wouldn't make any difference. There is that limit, anyhow.

The Court: I am inclined to think that the question as to the reason for the regulation is not a question of fact, is it?

Mr. Fuhrman: Very well. I just thought I would go into the difference, the reasons why there were two rates. [65] Actually——

The Court: We have to take it, there is some good reason that is the rate, and that is it.

Mr. Fuhrman: All right. I won't go into it.

Q. Does olive oil on olives, Mr. Rempel, do anything to their appearance?

Mr. Picard: I couldn't get that question.

(Question read back by reporter.)

A It gives the olives an attractive protective glossy appearance.

Q. (By Mr. Fuhrman): From your experience with olives, Mr. Rempel, would you say that a barrel of olives which had in it olive oil only one fourth of the way up from the bottom would be considered to be packed in olive oil?

The Court: In what?

Mr. Fuhrman: Olive oil.

Mr. Picard: I object on the ground it calls for the conclusion of the witness, on the ground it is the very matter before the Court to be decided, not within the chemist's knowledge.

(Testimony of Herman Rempel.)

The Court: I didn't get the word there.

Mr. Fuhrman: Packed in olive oil.

Mr. Picard: That isn't the question here at all, your Honor.

The Court: I will sustain the objection. [66]

Q. (By Mr. Fuhrman): Would you consider that such a——

Is the objection sustained upon the fact that it goes to the ultimate issue?

The Court: What has that got to do—there is nothing in this case as to what it is packed in.

Q. (By Mr. Fuhrman): Would you consider the olives in that—strike that. I will repeat the question.

Mr. Rempel, with your experience with olives would you consider a barrel of olives in which the liquid, whether it was olive oil or anything else, only went 25 per cent of the way up from the bottom of the barrel, would you consider the olives within that barrel to be packed in liquid?

Mr. Picard: Object to that, if your Honor please.

Mr. Fuhrman: Let me finish the question.

Q. ——preserved in liquid?

Mr. Picard: I object on the ground it is not an expert question. It is not a question for the chemist to determine. That is the very question to be determined here.

The Court: The chemist may testify about, but, of course, this call for his conclusion on the question here for decision.

(Testimony of Herman Rempel.)

Mr. Fuhrman: That's right, it does, your Honor, I submit that that——

The Court: Well, I am inclined to hold against you on that. The witness has already testified as to the process. He has already explained what the process is, that the olive is [67] cured by salt process and that afterwards when this oil is put on it that it helps to preserve the outside of the olive from——

The Witness: Molds.

The Court: That was his testimony. So I think that any conclusion from that is a matter of law. And hence were the witness to answer your question, it would be an answer to a question of law.

Q. (By Mr. Fuhrman): Are you familiar with the methods used to preserve foodstuffs?

A. Yes, I am.

Mr. Picard: Food what?

Mr. Fuhrman: Foodstuffs.

A. There are many different methods.

Q. From your knowledge of packing foodstuffs, how would you go about preserving something in liquid?

Mr. Picard: I will object to that, if your Honor please, upon the ground that that question is too general. We are dealing with one substance here, not all kinds of foodstuffis.

The Court: I am inclined to think that question is too broad.

Q. (By Mr. Fuhrman): If you want to preserve olives in liquid, Mr. Rempel, if you were

(Testimony of Herman Rempel.)

called upon by an olive manufacturer or I should say processor and asked how to preserve olives in liquid, what would your answer be?

Mr. Piccard: I will object to that, if your Honor please, [68] upon the ground that that is not the question here. The question is whether this particular kind of olive was preserved in juice or syrup or liquid other than alcoholic. Now there might be a hundred different ways to do it. We are not interested in that. We are only interested in this one type of olive, your Honor.

The Court: I think counsel is right. That is the only question in this case, whether these particular olives—and he has already answered your questions about that.

Mr. Fuhrman: Very well. I won't pursue that farther.

The Court: Anything else of the witness?

Mr. Fuhrman: No. I think that is all.

The Court: Mr. Picard, do you have any questions?

Mr. Picard: Just a couple of questions, your Honor. That is all.

Cross-Examination

By Mr. Picard:

Q. I show you a jar of olives and I will ask you if these are not what are called olives, salt-cured, not preserved in liquid?

A. Yes, these are—have the appearance of salt-

(Testimony of Herman Rempel.)

cured olives, to which the oil has not yet been applied. In other words, they have not been oil-coated.

Mr. Picard: I will ask this be marked in evidence as Defendant's next exhibit and I would like to have it displayed [69] to the jury.

The Court: Very well.

The Clerk: Defendant's Exhibit B introduced and filed into evidence.

(Thereupon jar of olives, not oil-coated, was received in evidence and marked Defendant's Exhibit B.)

Mr. Picard: That is all.

Redirect Examination

By Mr. Fuhrman:

Q. Mr. Rempel, I want to direct your attention again to Defendant's Exhibit B. Do you consider those olives preserved as they are now?

Mr. Picard: I couldn't hear you.

Mr. Fuhrman: I asked him if he considered these olives to be preserved, as they are salt-cured.

A. Yes, they are.

Q. In your opinion, what would the addition of olive oil do for these olives?

A. It would give them a glossy appearance.

(Testimony of Herman Rempel.)

Recross-Examination

By Mr. Picard:

Q. In addition to giving them a glossy appearance, it would preserve them, would it not?

A. Well, the olives would keep very nicely just the way they are. But if they should be washed off, there would be a [70] tendency for mold to grow on them. And in that case, if they were washed, the oil would help to inhibit the mold growth on the surface.

Q. That is, if you washed the salt off so that they weren't salty, washed them, then you would the olive oil on them for the purpose of preserving them, wouldn't you?

A. You can't wash the salt out of the olives because the salt is inside the edible portion.

Q. You could wash the salt off the top of them, the outside of them by washing them?

A. Yes.

Q. And then if you did that, you would put the olive oil on them to preserve them, wouldn't you?

A. Well, it wouldn't preserve them, the olive oil alone would not do it. The olives underneath would have to be preserved with salt first. But it would help to keep the mold growth off.

Mr. Picard: That is all.

A. Because mold does not flourish well in oil medium. It has to grow where moisture is present.

The Court: If you took these olives off the trees,

(Testimony of Herman Rempel.)

you couldn't just pack them in a barrel with olive oil, could you? A. No, they would not keep.

The Court: They would not keep. So the process of preserving them in a more or less—more or less permanently is accomplished by the salt [71] processing?

A. That's right. The salt goes into the edible portion. It replaces the water and preserves the olive. It is not subject to bacteria fermentation and mold.

The Court: Anything else you gentlemen want to ask?

Mr. Picard: That is all.

Mr. Fuhrman: That is all.

(Witness excused.)

Mr. Fuhrman: At this time I would like to have the Court take judicial notice of a definition of the word "in" as found in Webster's New International Dictionary, Second Edition, 1944. The word "in":

"Primarily, 'in' denotes situation or position with respect to a surrounding, encompassment or enclosure, denoted by the governed word.

"2. Indicating relation to a whole which includes the parts spoken of; as, the tallest boy in the class, one in a thousand; with respect to material means or constituents, as a statue in marble.

"Used predicatively or post-positively indicating a position of encompassment, enclosure, etc.; specifically (a) enclosed or contained."

The Court: What you are saying is argument.

Mr. Fuhrman: Sir? [72]

The Court: That is argument: It is not——

Mr. Fuhrman: I am just giving a definition.

The Court: I don't think that is anything a jury can take judicial notice of unless the Court instructs them. I don't see any harm in your reading the definition of the word 'in,'' but I don't think it is any evidentiary matter that the jury can do any more than pay attention to as an argument by counsel.

Mr. Fuhrman: Very well.

The Court: Is there anything else you have to present?

Mr. Fuhrman: I have one further matter, your Honor.

To clear up technically something that went on this morning regarding the one tariff as to classification, technically to clear the matter, but I would like to clear it up by Mr. Swanson.

E. J. SWANSON

recalled as a witness on behalf of the plaintiff:

Redirect Examination

By Mr. Fuhrman:

Q. Regarding the two sheets from the Consolidated Freight classification No. 17 in Rule 2, his Honor asked whether or not that was the statute of Interstate Commerce Commission, and I believe it was indicated to the Court and to the jury that it was a statute, but I find since that it is not a

(Testimony of E. J. Swanson.)

statute. But if you will tell us exactly what [73] it is, Mr. Swanson.

A. Well, it is a carriers' regulation, rule regulation that has been made mandatory through action of the Interstate Commerce Commission. That is actually what it is.

Q. Does the carrier file that with the Interstate Commerce Commission?

A. The carrier files that with the Interstate Commerce Commission and then it becomes binding on the shipper and the carrier.

Q. And are copies published of that document for the benefit of the shipping public?

The Court: Well, this is just what is ordinarily known as a tariff.

Mr. Fuhrman: That is correct.

The Court: They are required by the statute to be filed by the Interstate Commerce Commission and the shipper and the carrier is bound by it.

Mr. Fuhrman: That is correct.

That is the only matter I want to clear.

Mr. Fuhrman: I will offer that as an exhibit.

The Court: I will hold this a matter of law that that is so. I don't think we need to have it marked as an exhibit in evidence.

Mr. Fuhrman: All right, your Honor.

(Witness excused.) [74]

Mr. Fuhrman: Your Honor, before the plaintiff closes its case, do you want to hear the matter of jurisdiction?

The Court: I don't think so. I found the cases directly in point on the matter. But that need not be taken up in the presence of the jury.

The plaintiff rests, does it?

Mr. Fuhrman: The plaintiff rests, your Honor.

The Court: Did you want to make a motion? I will excuse the jury for a few minutes.

Members of the jury, we will have a legal matter to hear, so you can go out.

(The following proceedings were had outside the presence of the jury.)

Mr. Picard: If your Honor please, I move the jury be instructed to render a verdict in favor of the defendant upon the ground that the plaintiff has failed to prove the allegations of its complaint. That in order that the plaintiff recover in this action, it would be necessary to show that the olives here in question came under the item 5670 of the tariff, which provides for "olives, salt-cured, not preserved on liquid," and that the plaintiff has failed to prove that they come within that item, but the evidence here affirmatively shows that they do come within the item 3800 which provides for olives preserved in juice or liquid, whose juice or syrup or liquid?—other than alcoholic. All of the testimony here [75] shows that, first of all, the olives were preserved in olive oil, a liquid. Their own witness testified that that preserved them from mold and, furthermore, that there was a quantity which would be about from one quarter to one third

of a keg full of the liquid which, upon it being turned and moved, covered the entire contents of the barrel. So they have not only shown that it does not come within the higher tariff but affirmatively have shown that it comes within the lower tariff and therefore I ask that the jury be instructed to render a verdict for the defendant.

The Court: Well, counsel, I take it that there is no evidence that you are going to introduce that is going to be contrary to the testimony given by Mr. Paoni, is there?

Mr. Picard: No. I have witnesses to confirm that, to confirm this method of shipping olives, to show that for 25 years or more these olives made in this manner, processed in this manner, have been shipped and charged for under the lower tariff; that persons who are familiar with it know that these are not what you call Sicilian olives but are a different type (if we are going to go by name), and that they are, as your Honor could observe by looking at the exhibits—there is a liquid in them, a liquid forms in them, and they are preserved in liquid.

The Court: That is the question involved in the case, but as I sat here and listened to the testimony as it has been [76] given by the man in charge, Mr. Paoni, it seems to me that we have been unduly keeping the jury here. There is no question of fact involved in the case at all. It is a question of whether or not, according to the process which undisputedly was used, because the plaintiff has put that testimony on himself or itself, is whether or

nor these olives were canned or preserved in juice or in syrup or a liquid other than alcoholic. Now that is the only question involved in the case, and the method by which it is done is not in dispute.

Mr. Fuhrman: I submit it is a matter of law.

The Court: Under those circumstances it is not only a question for the jury, but according to decisions under the statute, that is the duty of the Court to decide which tariff should apply.

Mr. Fuhrman: For that reason, I move for a directed verdict in favor of the plaintiff.

The Court: I think the whole matter could have saved time—time could have been saved in this case by just a stipulation as to the facts and then a determination as to whether or not which tariff should apply. I don't see any question of fact in it.

If you will look at the case of Bernstein Pipe & Machinery Co. against the Denver and Rio Grande Railroad Company—I don't know whether counsel has that case or not—it is a recent decision of the Tenth Circuit Court of Appeals, December, [77] 1951—this identical question was—not with respect to olives, but with respect to two classifications of material—and the question was which classification should apply, and the Court also held in that case that the United States District Court has jurisdiction irrespective of the amount involved and goes on to point out that where there is no occasion for the exercise of any administrative discretion that it has to be performed as to the turning and meaning of the words of the tariffs which are used in

their ordinary sense and to apply that meaning to the undisputed facts. And that is all that is presented to this court.

Here is something that is undisputed, the method by which the olives were packed and prepared. That is undisputed. The testimony the plaintiff has put on is the testimony of the man in charge. I am not even interested in the testimony of any experts. I don't see that would have anything to do with it. It is a question of whether or not on the undisputed facts to apply the meaning of the tariff. It is purely a question of law. I don't see what a jury could decide in that case. There is some room for dispute and I think counsel should argue it more fully, as to the meaning of this tariff provision as to whether or not these olives were canned or preserved in juice or in syrup or liquid other than alcoholic, as disclosed by the facts.

I would like to have more argument on that question before [78] I would want to decide it, but I don't see that there is any point of wasting the time of the jury here. It is a comparatively simple matter now and it may not be simple in solution, because no problem is simple in solution. But what the problem is simply, here we have olives packed in—which were treated and packed in a certain way. Now, were those particular olives under one tariff or under the other? That is a question of law. I would have to hold this is not a jury question, unless you were going to dispute the testimony of your own manager.

Mr. Picard: No, I don't intend to dispute that.

The Court: You might as well face the fact right square in the eye. I suppose your client said, well, we want to have a jury because we want our fellow citizens to decide whether the railroad company is being arbitrary with us, we want twelve ordinary people to decide this matter. And I can just imagine him telling you that, Mr. Picard, and, of course, you have to be guided by what your clients want. But there is no emotionalism that can be involved in this. You can't appeal to the emotions, the feelings of the jury with somebody that hasn't got a leg cut off here, you can't dwell at great length on this suffering the person has undergone. It isn't that kind of a matter. It is a pure matter of law, and I don't see any escape from that fact. I think we would profit much more judicially in the case if you will present arguments as against the background of the facts. We have the question of the application [79] of these tariffs.

Mr. Picard: Did your Honor think it would make any difference if the railroads had accepted shipment of that type of olive for 25 years?

The Court: That might be a matter of argument, too. I don't know. I would be inclined to think that—and this is only offhand because I have been involved in some of these Interstate Commerce Commission cases—in fact, quite a few of them—I am inclined to think offhand, unless there are some decisions that I don't know about, which is quite possible, that it wouldn't make any difference at all what the railroad did in the past, that they have to enforce the tariffs, and even if they have—I had

a case that went to the Court of Appeals. It involved a demurrage question, some years ago.

Mr. Fuhrman: Western Pacific?

The Court: A Western Pacific case, in which there was some question of that kind, as to whether or not that was the way the railroad company had acted in the past. I held that it didn't but the Circuit Court reversed in that case. But I think it was more on the ground that there was an affirmative act that created almost an act of God that prevented the enforcement of the regulation. But it seems that it is quite clear that the railroad company can't vary the tariff. It just can't do it if it did it for 50 years——

Mr. Fuhrman: There is no stopping it. [80]

The Court: It doesn't make any difference. It could have charged the lower rate for 25 years and then somebody would come up and stick a pin in them, woke them up to the fact that they had charged a wrong rate, why, they would have to go ahead and charge the other rate. And there is no such thing as an estoppel that was disposed of by it.

Mr. Fuhrman: The Bing case——

The Court: The famous—the original famous statute that prohibited rebates. That was all considered and disposed of in that act. So I don't think it would make any difference, unless there is some special matter that you have in mind that you looked into.

Mr. Picard: I didn't think that the theory of the estoppel was applicable. What I had in mind, there

were decisions where if there are two tariffs applicable or where the article could possibly come within the definition of two different tariffs, that the shipper is entitled to it.

The Court: Wouldn't that equally be a question of law? The tariffs themselves say where they are subject—where the facts show that the commodity is subject to two tariffs that the lower is the applicable one. Isn't that right? Isn't there some such ruling as that?

Mr. Fuhrman: That is the general policy. The general line of cases hold to that effect.

The Court: Again you have the question of [81] law as to whether or not the commodity is, analyzing the language properly, whether or not it is ambiguous to the extent that the commodity might be governed by two tariffs——

Mr. Picard: Then what I had in mind was that being the principle, if they had for 25 years uniformly applied the lower tariff, it would indicate rather clearly that was their own——

The Court: In the ordinary lawsuit the rule of law that you are speaking of—in the absence of the jury—In other words, the practical interpretation of parties put on the contract. I remember a very famous case in California that is often quoted Melone versus Ruffino—I think it is 150 California —I used it quite frequently—in which they quoted Lord Coke's rule: You tell me what the parties have done under the contract and I will tell you what they meant by the contract.

That is what you are referring to?

Mr. Picard: Yes.

The Court: That rule of law is—there is no question about it, it is not applicable to matters of tariff, because there the railroad company can't interpret the tariff. It has to apply the tariff the way it is filed. That is all there is to it. If there is a dispute about it, then it has to be settled by the Interstate Commerce Commission and by the Court, not in accordance with what the parties may [82] have interpreted but the way it is interpretable as a matter of law.

Mr. Picard: There was an application of the rule somewhat like it by one of your Honor's predecessors on this bench. When he was in the District Court of Appeals, Judge Kerrigan in an unlawful detainer action where they claimed that the description of the property was not clear and it was the same description in the lease, and he said if it was sufficiently clear for them to find their way in they could likewise find their way out.

The Court: That is good law.

What do you suggest, Mr. Picard? There is no use in keeping the jury here unless you think that there is some purpose, something that I haven't considered, and the evidence will be just the same—won't it?

Mr. Picard: The evidence will be the same.

The Court: Why don't you just—may I suggest to you, why don't you submit the case on the evidence that is now in and then take your time and present your argument on the matter of the applica-

tion of the tariffs. I think that will be very much more helpful to the Court in deciding it.

Mr. Picard: Would your Honor think that anything could be accomplished, even though your Honor dismisses the jury, by my offering some evidence of the persons who have actually shipped these olives, as to the method of packing and [83] similar packing?

The Court: Would they say anything different?

Mr. Picard: No. They couldn't say anything different than Mr. Paoni did—not as to the shipment of them.

The Court: As to the preparation and shipment?

Mr. Picard: No, because that is the way the olives were prepared and shipped.

The Court: I don't see that it would add anything to it, because the test of what tariff applies is the manner in which the olives were prepared and shipped. Isn't that right?

Mr. Picard: Pardon me. I didn't mean to interrupt.

The Court: That's all right.

Mr. Picard: I also have some olives that I didn't want to offer in evidence with any of these witnesses but I had intended to offer them in evidence in the defendant's case, if it becomes necessary to present any evidence of the olives that were not preserved in liquid, that were treated as these olives were, not preserved in liquid to show that they became moldy.

The Court: Like the same type of bottle you just showed the witness.

Mr. Picard: No, your Honor. These are the type of olives which we claim come within the higher tariff. These olives, your Honor, are salt-cured, not preserved.

The Court: These are salt-cured and no oil was put in [84] them?

Mr. Picard: That's right.

Now we have some that were salt-cured or brine-cured—brine-cured rather than salt-cured—brine-cured and washed and not preserved in oil and they become moldy.

Mr. Fuhrman: I submit it isn't even relevant if they are brine-cured.

Mr. Picard: In other words to show that the oil does preserve them, your Honor. That would be my purpose in that.

The Court: Well, of course, I don't think there is any doubt that there is some, according to the testimony of the witness for the plaintiff, that there is some preservation that takes place as a result of the use of the oil because he said it preserves against the mold being formed. But, as I see it, it is not the question in the case. The question is whether or not these olives are canned or preserved in juice or in syrup or liquid other than alcoholic, which is a different question entirely.

Mr. Picard: Well, of course, "preserved" does not mean immersed, your Honor, and what they are contending for is virtually "immersed."

The Court: Well, canned or preserved in juice or in liquid or syrup other than alcoholic—that is the process by which the preservation is accom-

plished; which would not be true, would it, if there was no process of curing? [85]

Mr. Fuhrman: That's right.

The Court: However, I don't know. Offhand I think that the weight—you had a little heavier burden that the other side in that regard. But I am not —until I have heard all of the testimony—I am not so sure as to whether or not that tariff applies at all in this case. That is why I prefer to hear more argument on it, and I think that is the way to present this matter. There is no use taking up time for so showing that. That is not really—that's just fancy. It is better to get—better to spend the time and the energy on the phase of the case that is really important to the decision. I hope you don't feel that I am trying to tell you how to present your case.

Mr. Picard: Your Honor is the one to determine it.

The Court: I am not trying to tell you how to present the case. But it just seems to me that's it, and why waste time and money with it. Let's get at the discussion of that matter.

Mr. Picard: Your Honor is the one to whom it is presented and the one to determine it. So necessarily I want to present it as your Honor wishes.

The Court: I don't want your clients to feel aggrieved that I am trying to deprive them of a jury trial, but I would have to hold there is no question of fact in the case and the Court must apply the tariffs. That is a question of law. [86] There are quite a number of decisions in that regard.

Mr. Picard: In other words, your Honor does not think it is a question of fact to be determined, whether they were preserved in juice or liquid?

The Court: I think it is a question, entirely a question of law, and I would suggest to you that you submit the matter and then argue it. If after that it appears there is some matter that we have overlooked, it might make a factual difference in the matter—although I don't think it is conceivable, although I don't want you to—I don't want to induce you to get into a situation where you would be hamstringing yourself in any way—if that does appear, why, we can always open up for further consideration.

Mr. Picard: All right, your Honor.

The Court: I think that would be the sensible thing to do. And then we can either spend some more time this afternoon in argument or, if you wish to submit something in writing on it, it would be better to have it this way as well.

Would you be agreeable to doing that?

Mr. Picard: That is agreeable.

The Court: Let the record show that the matter will be submitted and the Court will discharge the jury and then we will proceed to argument and briefing in the matter, preserving to the defendant the right to reopen the case if it appears that in the interest of justice—if it appears that it is in [87] the interest of justice to do so, for the presentation of further evidence.

Bring the jury back.

(The following proceedings were had in the presence of the jury.)

The Court: Members of the jury, the Court has found that it is proper in this case for the Court to decide this matter, the case as a matter of law, and for that reason the jury won't have the benefit of eating any of these olives in this case. We won't need the services of the jury in this case any more, and I am discharging the jury at this time. I don't know when you will be needed again, but you are discharged until further notice and the jurors may be free to depart.

(The jury was thereupon discharged, and a short recess taken.)

Mr. Picard: May I be permitted to put Mr. Krackov on the stand to testify as to his practical experience with olives of this type? He has shipped them for more than 25 years.

The Court: I have no objection to that.

E. A. KRACKOV

called as a witness on behalf of the defendant, sworn.

The Clerk: Will you please state your name?

A. E. A. Krackov. [88]

Direct Examination

By Mr. Picard:

Q. Where do you live, Mr. Krackov?

A. New York City.

Q. What is your business?

(Testimony of E. A. Krackov.)

A. I am a broker and commision agent.

Q. In what type of products?

A. Imported products, particularly olive oil and olives.

Q. And under what name do you do business?

A. Trans-Oceanic Sales Company.

Q. Where is the principal office of the Trans-Oceanic Sales Company?

A. 6 Harrison, New York City.

Q. You are also a stockholder of the defendant in this action? A. I am.

Q. Have you been engaged in the olive oil and olive business for some time? A. Yes, I have.

Q. How long? A. Oh, about 25 years.

Q. Generally will you state your experience in it?

A. I have sold all types of olives, both imported and domestic, which were substituted for the imported olives.

Q. Are you familiar with the various designations in the trade? A. I am. [89]

Q. Of olives? A. Yes.

Q. Will you tell me what generally in the trade and in your experience is considered a salt-cured olive not preserved in liquid?

A. Salt-cured olive is considered a dry olive, cured in salt and shipped dry.

Q. You are familiar with the jar of olives which is marked here as Defendant's Exhibit B?

A. Yes, these are what we call dry salt-cured olives.

(Testimony of E. A. Krackov.)

Q. Not preserved in liquid?

A. Not preserved in liquid and shipped dry.

Q. And how are they shipped?

A. Usually in cases, in wooden cases, and not in barrels.

Q. Or kegs? A. Or kegs.

Q. Is that an edible olive as it is?

A. Why, certainly. These are what we sometimes call tree-ripened or baked olives that we used to import and that we have been substituting in this country in a small degree.

Q. You heard one of the witnesses here refer to what he called Greek-style olives? A. Yes.

Q. Do you know what a Greek-style olive is?

A. Certainly. [90]

Q. What is a Greek-style olive?

A. Greek-style olive is a black olive preserved and shipped in brine and not in salt.

Q. I show you what is here as Defendant's A in evidence and I will ask you if the olives that are found in that jar are what are called Greek-style olives?

A. No, these are not Greek-style olives. These are oil-cured olives.

Q. Will you state the distinction between those and the Greek-style olives?

A. Greek-style olives are cured and packed in brine, and oil-cured olives are salt-cured at the beginning. The salt is completely eliminated and then it is packed and preserved in olive oil.

(Testimony of E. A. Krackov.)

Mr. Fuhrman: May I have that answer?

A. And the juice——

(Answer read back by reporter.)

A. And the juice of the olive.

The Court: Well, you couldn't eliminate the salt from inside the olive?

A. The salt is not in the inside, your Honor.

The Court: It must get in.

A. It penetrates it.

The Court: You mean the olive?

A. It penetrates the—the salt, after it is in solution, [91] penetrates the meat of the olive.

The Court: It must have a curing effect. They wouldn't go through with the business of curing it if the salt didn't have a curative effect.

A. The curative effect in the instance of the oil-cured olive is to dry the olive partially by extracting part of the water, that is naturally in the olive. But our intention is never to extract all of the water because that does not give you an oil-cured olive in the sense that it is sold as in the trade.

Q. (By Mr. Picard): In other words, is that the distinction between this shriveled-up appearance——

A. That is the distinction between the salt-cured dry olive and the oil-cured olive.

Q. In other words, when all the salt is removed—when all the salt is removed and salt-cured, does it get that dried-up appearance which is in the jar which is here as Defendant's Exhibit B?

(Testimony of E. A. Krackov.)

A. You mean in the instance of the oil-cured olive?

Q. No. In the instance of the salt-cured olive, not preserved in brine, in liquid.

A. The salt-cured olive not preserved in liquid, the olive is permitted to get dry, almost bone dry, and it is sold as such.

Q. And in the olive which you described as an oil-coated olive—— [92]

A. We don't allow it to get bone dry because it becomes a different olive when it is bone dry.

Q. You are familiar with the processes used by the defendant here? A. I am.

Q. And what is the condition of that olive before the olive oil is placed on it?

A. The moisture of the olive is extracted but not in its entirety. I would say we leave about half of the moisture in the olive.

Q. Then what is the effect of the olive oil on it?

A. To preserve the olive against mold, because if we didn't the olive would get moldy.

Q. And have you seen the barrels after they are opened, after they are shipped?

A. Why certainly.

Q. And what is their condition as to whether they are preserved in liquid when they are opened?

A. When the olives are preserved in the oil, olive oil or juice of the olive?

Q. Yes. A. They are fresh and edible.

Q. Are they similar in appearance to the jar which you have in your hand, which is here as De-

(Testimony of E. A. Krackov.)

fendant's Exhibit A? Let me finish the question before you answer it, please, so that the [93] reporter can get the answer at the end.

Mr. Fuhrman: Objected to as incompetent, irrelevant and immaterial, not a fair statement of the evidence in this case.

(Question read back by reporter.)

The Court: I don't see—that has already been testified to by the witness. I will overrule the objection.

A. They are.

Q. (By Mr. Picard): Now, Mr. Krackov, in the trade and in your experience with selling olives and with the shipment of olives and your general experience in the olive business as a whole, does preserved in liquid necessarily mean immersed in liquid? A. No, not at all.

Q. Will you tell me, as far as weight is concerned, what is the difference in weight between the type of olives which are here, salt-cured, not preserved in liquid, as in Defendant's Exhibit B, and the type of olives as in Defendant's Exhibit A?

Mr. Fuhrman: I am going to object to that question on the grounds it is incompetent, irrelevant and immaterial.

The Court: Well, I sustained a similar objection of your opponent on that same ground. I will sustain the objection. I don't see that——

Mr. Picard: The only reason I said that, if your Honor please, notwithstanding you had sustained

(Testimony of E. A. Krackov.)

that objection, when your Honor was making your offhand remarks—— [94]

The Court: I sustained your objection on that very question.

Mr. Picard: But after your Honor sustained my objection you said there might be some question here as to a differential by reason of weight. That is the reason I asked the question. Does your Honor remember your statement to that effect?

The Court: I asked counsel what—I supposed that had something to do with the reason for the statute, for the distinction in tariffs as based on a similar circumstance.

Mr. Picard: Because of your Honor's remark——

The Court: I will sustain the objection.

Mr. Picard: I think it is obvious, if your Honor please, by looking at them there is a difference in weight, anyway. I thought possibly your Honor had in mind that that had something to do with it by your Honor having asked that question, having made that remark, that your Honor thought possibly that had something to do with a different tariff.

The Court: Anything else?

Mr. Picard: Yes, your Honor.

Q. Now, Mr. Krackov, you say you had been about 25 years, 25 years' experience in shipping olives similar to the type which are in the jar marked as Defendant's Exhibit A?

A. I have, yes.

Q. What rate has the railroad company charged

(Testimony of E. A. Krackov.)

for that type of olive, the higher rate or the lower rate? [95]

Mr. Fuhrman: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Mr. Picard: I think that is all.

The Court: Let me ask you, Mr. Krackov, going to the grocery store or the delicatessen store and buying a bottle of olives, either black or green, they are in a bottle and there is a liquid in them, water, I think it is, nothing more——

A. Brine, your Honor.

Q. Is that brine?

A. Yes, it is a light brine.

Q. Very light brine? A. Yes.

Q. That does have some brine in it?

A. Oh, yes, it has to have brine.

Q. That isn't true in the case of the canned olive?

A. The canned olive has a light brine too. Ten per cent solution.

May I say something, your Honor?

Mr. Picard: Better not. Is it an answer to the Court's question?

A. In connection with the Court's question. It might be interesting for the Court to note that these oil-cured olives are now being packed in New York in jars from our kegs right at the stores for sale off the shelf in their same state that [96] we ship them into New York.

Q. (By Mr. Picard): If you go into a store—

(Testimony of E. A. Krackov.)

take the Court's question—and ask for salt-cured olives that are not packed in liquid, similar to the ones that are here in the jar, Defendant's Exhibit B. How would you get those?

Mr. Fuhrman: I object to that qeustion. I object to the question the way it is phrased.

The Court: I suppose you would get them the way you asked for them. I would think you would get them in a bag. They are just dry.

A. That's right.

Mr. Picard: That is what I——

A. You would take them out of the case. Dispense them out of the case. Whereas——

The Court: This is all very interesting but it still doesn't answer the question we have in the case.

Mr. Picard: I thought it was helpful.

The Court: Any other questions of the witness?

Mr. Fuhrman: I have some questions.

Cross-Examination

By Mr. Fuhrman:

Q. Mr. Krackov, you have been in the olive business for a long time, have you not?

A. Yes, sir.

Q. And I assume in the course of your work you have come in [97] contact with the standards put out by the United States Department of Agriculture for olives? A. I have.

Q. I will show you a document here and I will ask you if you have ever seen that before.

(Testimony of E. A. Krackov.)

Mr. Picard: May I see what you are showing him?

Mr. Fuhrman: Certainly (showing counsel).

A. Yes, I have seen this before.

Q. What is it entitled? What is the title of the document? A. The title?

Q. Yes.

A. "Tentative United States Standards for Grades of Salt-Cured Oil-Coated Olives."

Q. I want to direct your attention to the asterisk after the title and ask you to read at the bottom there what it says. A. May I amplify——

Q. Mr. Krackov——

A. You want me to read that first?

Q. Yes. A. May I comment as I read it?

Q. Read it first in its entirety.

A. In fairness to the Court I think the Court ought to know all the facts concerning——

Q. Just a minute.

The Court: The trouble with witnesses who want to argue [98] the case, they don't help the case. Just answer the question. All I am interested in is getting the facts from the witness.

A. (Reading):

> "*This product is variously referred to in the trade as 'Greek olives,' 'Greek-style olives' or 'oil-cured olives.' "

Q. (By Mr. Fuhrman): So that according to this bulletin, Greek-style and oil-cured olives and Greek olives are similar products, are they not?

(Testimony of E. A. Krackov.)

A. As the bulletin states, it is tentative standards. They didn't know themselves what they were going to be called.

Q. I am asking you what is in the bulletin.

A. Yes.

Q. Now I have got another question I want to ask you. What is the definition for salt-cured oil-coated olives given at the top of the document?

A. "Salt-cured oil-coated olives are properly matured olives which have been cured by contact with crushed rock salt and after proper curing have been coated with olive oil."

Mr. Fuhrman: I would like to offer this in evidence as an exhibit on behalf of the plaintiff.

Mr. Picard: I will object to it, if your Honor please, upon the ground that is is not a standard. It is merely called "Tentative United States Standards" and further, it does [99] not meet the question which is here before your Honor. That question——

The Court: I don't think that you can make this as an argument to me. The definition is given by the United States Department of Agriculture, but I don't think that it is evidentiary in any way.

Mr. Fuhrman: Well, it is—it might be to this extent. The witness testified that Greek-style olives, oil-cured olives, were two different kind of olives.

The Court: I don't think that that is—I don't attach any weight to that. That isn't of importance, either, in the case, because the facts show these are

(Testimony of E. A. Krackov.)

salt-cured oil-coated olives. There is no question about it. There is no dispute about it. The process —let's not get down to that yet.

Is there anything else you want to ask?

Mr. Fuhrman: Has your Honor ruled on my offer of this document?

The Court: Mark it for identification. I will sustain the objection.

The Clerk: Plaintiff's Exhibit 2 marked for identification.

(Thereupon document entitled "Tentative United States Standards for Grades of Salt-Cured Oil-Coated Olives, Effective November 25, 1940," was marked Plaintiff's Exhibit No. 2 for identification.) [100]

The Court: The testimony of this witness is only informative as to the custom and the practice in dealing in the olives—in the olive industry. Anything that he may have to say on the question of the interpretation of the tariffs is purely argumentative.

Mr. Fuhrman: I have no further questions.

(Witness excused.)

The Court: Are you going to argue the matter now?

Mr. Picard: I would like to argue a little.

Mr. Fuhrman: May I have one moment while I talk to my expert witness? In view of the testimony of Mr. Krackov, I don't know whether your Honor attaches any importance to it or not.

The Court: Well, personally, I don't mean to be sarcastic about it, but I don't think this is a question for experts, because we have here a factual description of what is done and we have the language of the tariffs. Now an expert might say one way or the other about it. The only effect of that would be that he is interpreting the tariff.

Mr. Fuhrman: Very well, your Honor.

The Court: I don't see—I don't attach any significance to that. As I see the case now—I will hear the arguments. The factual issue is simple. The testimony without dispute shows that these olives were salt-cured. The process by which they were salt-cured was described. They were then coated with [101] oil and put in barrels and shipped. There is no dispute about that.

Now the question is whether or not these were canned or preserved in juice or in syrup or in liquid other than alcoholic, that would call for their being given a freight rate under that tariff classification. This is the case.

I think I fairly stated it. I perhaps may have over-simplified it, but that is what it is.

Mr. Picard: That is what I thought it was from the start. That is what I stated the first thing this morning.

Who did your Honor want to open the argument?

Mr. Fuhrman: The plaintiff?

The Court: The case is all submitted?

Mr. Picard: I had made a motion. On that motion I should open the argument.

The Court: The case is all submitted?

Mr. Picard: Yes.

The Court: In its entirety.

(Defendant rests.)

The Court: The plaintiff should take the laboring oar.

(Arguments in summation.)

Mr. Fuhrman: Your Honor has stated, I think, that the reference to the plain simple words of the tariff will guide the way to the decision of this case. The rate that the defendant is contending for here is canned goods rate as found [102] in the tariff under "Canned Goods." Striking out the words that are not particularly pertinent, that provision, item 3800, which is found on page 2 of the exhibit near the bottom, third line from the bottom, reads:

> "Olives, preserved in liquid."

That is the whole point. Later on in the tariff there is a more specific item, 5670, which reads as follows:

> "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails."

Now there is no question in this case as to the fact that these olives are salt-cured. Mr. Paoni has clearly indicated that in his testimony. The very important word in both tariffs is the word "in."

These olives are washed in fresh water when they come out of the salt. They are placed upon a table. Now bearing in mind the salt process in the first place is used to remove water from the olive and that the washing process is a quick one and just

washes off the olives, the only liquid that is in the barrel when the thing is finally packed is that which comes from the addition of the olive oil to the olives, and what little might remain on the olive as a result of the washing process.

Now your Honor has, I am sure, gone into the store and purchased stuffed olives or olives for Martinis or olives of that nature that are in a glass. That glass is full of a liquid, [103] which the witness Krackov has testified is brine. When you open a jar, and you want to get an olive, you go down into the liquid, you pull the olive out with a fork or some kind of an instrument. The liquid is there; it fills the glass. You can see it. I submit that the defendant's own exhibit in this case shows the paucity and the infinitesimal amount of liquid that is in this jar as compared to the olive, the green olive, that is in brine.

Now Mr. Paoni himself testified that he packs green olives and when he packs green olives he packs them in brine, and it is the same brine that those olives have been in since the beginning of the preservative process.

The Court (Examining an exhibit): This has got a little sour odor to it. Maybe it has been exposed or something. I don't know. I am just wondering if there was any possibility of any—no, it's just oil. It may have got a bit rancid. (Sampling an olive from the exhibit.)

Mr. Fuhrman: Mr. Paoni told us this morning when he packed his olives in brine, the green olives, the barrel is full of brine. The olives are covered

with brine. They are in the brine. The tariff uses the word "in." It does not say "near" the liquid or "by" the liquid. It says "in" the liquid.

Your Honor is familiar with rules, the interpretation that should be used in their regular sense. As I quoted for the jury and your Honor earlier today from Webster's New International [104] Dictionary, Second Edition, it says that "in" primarily denotes a situation or position with respect to a surrounding encompassment or enclosure, denoted by the governed word.

Counsel for the defendant would have us believe that a film of limited duration will accomplish the same result as a bottle full of liquid, as a green olive and the olives in the liquid. I submit first off that they are mechanically entirely different situations. The olive in the brine, which is the canned olive, as Mr. Krackov testified to, is in the brine. The jar is full of brine or the container, the barrel, is glass. Here we have the barrel only 25 per cent full, at the most, with the liquid. There is a film on it when he puts them in there. Suppose you took the barrel of olives packed in brine and the barrel of olives packed, as are the ripe olives in this case, set them side by side on a shelf and left them there, what would happen? The olives in the brine, your Honor, would continue to be preserved in the brine. Nothing has to be done to them because they are encompassed by the liquid. They are in it. The other olives, as the witnesses testified to here today, have to be manipulated in order to retain any of the film upon it. The film runs off the olives. If these olives

are packed in the manner in which Mr. Paoni says they are packed, are left alone, it would drain off and mold will form. Therefore, as he testified and told us today, the barrels have to be turned. [105]

The Court: Apparently the oil does adhere to some extent to the olives.

Mr. Fuhrman: It does, to some extent, certainly, but it does not adhere to a sufficient extent so that you could leave a barrel of olives without turning it, as you can a barrel of olives in brine.

The Court: I think the question turns more on the meaning of the word "preserved" than it does on the word "in."

Mr. Fuhrman: I am coming to that, too.

The Court: Because you might have a liquid being used to coat the product with that would adhere to it and would have preserved the qualities without necessarily having complete immersion of every bit of olive.

Mr. Fuhrman: Well, coming to the matter of the word—use of the word "preserved," I think it is clear from the testimony that the main preservative in the case of all olives, whether they are Mission ripe olives, whether they are green olives, whatever they are, it is the salt. Salt is the universal preservative that has been used for ages for anything, almost any foodstuffs that you can think of. It is in the salt, the olive is, for a long period of time, from three weeks to five weeks.

The Court: What you are really talking about here is that the tariff classification is intended to

cover two different commodities, one exclusive of the other? [106]

Mr. Fuhrman: Yes, your Honor.

The Court: When you are talking about olives that are salt-cured, you mean by that only olives that are salt-cured and that the technique of preservation is only salt-cured. Whereas, when you are speaking under the section of canned goods and preservation, you are talking about there something that in which it is preserving technically, consists of a procedure in juice or liquid non-alcoholic in form or syrup which constitutes the process of preservation?

Mr. Fuhrman: Well, to a certain extent——

The Court: I think that is what——

Mr. Fuhrman: I will agree with that, except salt in both cases is the preservative.

The Court: No, you could have olives that would come under the classification of the tariff on page 87, couldn't you, if they were just olives that were preserved in juice or in syrup or liquid other than alcoholic and they wouldn't have to have anything else and they would come under that classification, wouldn't they?

Mr. Fuhrman: Yes, they could.

The Court: I mean, under the terms of the classification, that is where they fall.

Mr. Fuhrman: Under the terms of the classification.

The Court: Maybe it wouldn't do any good.

Mr. Fuhrman: Unless the preservative—unless the juice or [107] syrup was a brine, that's correct.

The Court: But suppose they took a lot of olives and they picked them off the trees and they stuck them in the syrup that had just olive oil in it and didn't have any brine in it at all, they might not turn out to be any good, they probably wouldn't, and according to what the witnesses have said, but they would still come under that classification of the tariff, wouldn't they?

Mr. Fuhrman: Yes, they could be canned in Coca Cola and still come under the classification as it reads, that is correct, your Honor, provided that it was a preservative.

The Court: Provided it was a preservative.

Mr. Fuhrman: In other words, the liquid, it has to—in my interpretation of it, is that it has to be in it and it must be a preservative.

The Court: Must be preserved by the liquid.

Mr. Fuhrman: Yes, in this case, in the technical sense, and you have to consider the trade usage. The preservative of an olive is the salt. True, the olive oil does tend to prevent mold and does so prevent mold. But the basic deterrent to bacteria disintegration of the olive——

The Court: According to your theory of it, then, this classification that is on page 87 could only, practically speaking, the only commodity that would be shipped pursuant to that would be olives shipped in brine? [108]

Mr. Fuhrman: For a practical matter, yes, your Honor, I would think so, because unless you had brine you couldn't be shipping them—according to the standards and the understanding of the business,

you couldn't ship them in any other juice or liquid or syrup than brine in order to preserve them.

The Court: If you didn't go through any other process.

Mr. Fuhrman: That's right, because that is all that has been testified to as being used in the trade as a preservative for olives of this nature, that is brine.

The Court: When you get to the other classification, the olives there are cured by salt, then they rub oil on them, and while that oil might not be entirely the preservative element, if it had some preservative element or effect to it would it have to be the entire act of preservation in order to bring it within that tariff?

Mr. Fuhrman: If I understand your Honor, do you mean are we contending that——

The Court: Well, suppose the process of preservation consisted in part of the salt process and in part of applying olive oil at the time of shipment to the olives which had been salt cured. I am talking now about the preservation technique.

Mr. Fuhrman: You have got salt-cured anyway.

The Court: But there is nothing in the tariff on page 87 that says the canned or preserved olive in juice or in liquid or in syrup could not also be salt-cured. [109]

Mr. Fuhrman: That's right. It could be salt cured. I agree. And then you have to determine what do the words "preserved in liquid" mean.

The Court: You think that in order to meet that tariff then, that you have a salt-cured olive, you are

going to preserve it in liquid form, you have got to immerse it in a liquid that will have preservative qualities to it before it can get this classification?

Mr. Fuhrman: I think so, your Honor.

The Court: You don't think that the coating with olive oil would, and putting it in the barrel, would, even though it has a preservative quality, would meet the requirement of the tariff as to preserved in liquid?

Mr. Fuhrman: No, I don't think that film of oil as liquid in the first place, from a strictly mechanical sense, and in the trade usage as well. When you consider a film of oil alongside of an olive packed in a container full of brine, then you must consider both usages and both instances. If you consider a can of peaches, the peaches are packed within something. They are in the juice. Ordinarily when you can fruit—I don't know how familiar your Honor is with canned fruit—there is a liquid used in the canning. The object that is canned is contained within the juice. Here it is not, particularly when you compare the two methods of canning olives. I do not believe it is reasonable. [110]

The Court: It really comes down then to, according to your argument, as to whether or not preservation under the tariff, what preservation in liquid means. You say it is the quantity of liquid that determines whether or not——

Mr. Fuhrman: In a way, yes, that is correct. The liquid must be a preservative and from the trade usage it must cover the item. If you say "pre-

served in the liquid" it would seem to me to imply that the item must be encompassed by a liquid.

The Court: I suppose that the difference in the tariffs is occasioned by the fact that if you don't pack them in liquid you get more olives shipped.

Mr. Fuhrman: You do.

The Court: Is there more value to the shipment?

Mr. Fuhrman: It is heavier than the other way.

The Court: In other words, if you have a whole barrel of olives, and they are floating around in liquid, you haven't got so many olives.

Mr. Fuhrman: Yes.

The Court: And in that event you haven't got as valuable a commodity in the trade and the freight would be more.

Mr. Fuhrman: If you follow—excuse me, your Honor.

The Court: That's all right.

Mr. Fuhrman: If you follow the line of reasoning of Mr. Picard, where do you draw the line as to how much liquid is enough: one inch out of 23, two inches; would you say a 32nd of [111] an inch is preserved in liquid; would you say a 64th of an inch is preserved in liquid, or is 12 inches? Where do you draw the line? I say from a practical point of view you have to first consider trade usage and the various methods of packing the same product, and you don't have to look very far to find an item that falls clearly under the olives.

The Court: There is another angle to it, too, isn't there? Not only the quantity of what constitutes the liquid but what constitutes preservation?

Mr. Fuhrman: That is true. You have the true elements, preservation and——

The Court: If they are talking in the tariffs about preservation in the sense of entirely preserving the olive, then you have got one thing. If they are talking about preserving the outside of it from mold, if that could be preservation in the tariff sense, then they would be entitled to get the lower rate. I think that by and large you have to take the common sense meaning of these two tariffs to see what distinction they were really trying to draw.

Mr. Fuhrman: I agree. You have to be very practical about it in the extent of the distinction they were trying to draw in the tariff.

I think that about concludes the position of the plaintiff, your Honor.

With one further remark, I will conclude. I would like to [112] direct your Honor's attention to the cases that have been before the Court in this last year entitled Southern Pacific Company versus Nicolo Musco, 29577. That case was substantially the same as this. The end result of the processing was that you had an olive that was processed and full of salt. Mr. Musco thereafter covered them with oil. I don't know whether he used as much oil as the defendant did here or not. In any event, he used a quantity of oil with which he coated the olives and put them in cans. The same issue was before the Court and in that case Judge Roche granted judgment for the plaintiff Southern Pacific Company.

The Court: Did Judge Roche write any memorandum on the case, do you know?

Mr. Fuhrman: Your Honor, could I explain that case? I tried that case before Judge Roche, and in explanation of it I should like to say that the issue was substantially identical with that before the Court in this case. But the testimony in that case was this, the olives were processed by placing them in a heavy brine solution. The defense was that this heavy brine solution contained salt, penetrating to the pit of the olive until the olive had become fully cured. The olives were then removed from the brine solution, placed on a table, coated with olive oil, and then placed in barrels, and shipped in that fashion. No additional liquid being placed in them. [113]

In this case, if you understand and recall, we had a situation where the olives were processed by placing them between alternate layers of salt. So the end result, your Honor, was the same.

The Court: That is, there was a salt-curing method but a different salt-curing method in one case than in the other?

Mr. Fuhrman: That's correct, your Honor.

The Court: Then the olives were placed on the table, covered with oil and packed in barrels?

Mr. Fuhrman: That's right. In that case, as it developed, there was an issue, one as to whether they were salt-cured olives, and, secondly, as to whether they were preserved in liquid. The testimony was heard by Judge Roche, there was no jury, and he resolved the issues in favor of the plaintiff, and his conclusion was in effect that the olives as a matter of fact—as a matter of fact, there was a finding of

fact that the olives were salt-cured and that they were not preserved in liquid.

I feel somewhat handicapped in referring to that case, your Honor, because if I had prepared the findings of fact a little differently, why, there would have been a clear cut comparison. I would be glad to show you the findings of fact and we would have the identical situation. But in preparing the findings of fact I just recited the ultimate facts of the case, that is, that the olives were salt-cured and not—— [114]

The Court: That is agreed in this case, there is no dispute about the fact that the olives were salt-cured and then covered with oil and put in the barrel.

Mr. Fuhrman: Yes. It was Judge Roche's conclusion that they were not preserved in liquid and that the higher rate was properly applied to the shipments.

The Court: That is a decision of this court. Have you examined the record?

Mr. Picard: Part of it, your Honor, not all.

The Court: It is pretty hard to determine whether or not the situation would be binding without having any more precise record.

Mr. Fuhrman: Findings of fact and conclusions of law——

The Court: It wouldn't be binding res judicata but it would be, if it were a decision by the Court on the same question of law, it would be binding on the other judges.

Mr. Fuhrman: Yes.

I might say, your Honor, it was for that reason that a motion for summary judgment was made in this case, and, as Mr. Picard pointed out earlier today, the motion was heard before Judge Roche, and it is my recollection and understanding that he denied the motion on the ground that he thought there was a different factual set-up in this case because of the different method of processing, and that was the only point upon which, as I understand it, the motion was denied. [115]

The Court: When was the decision before Judge Roche in the other case?

Mr. Fuhrman: Approximately a year and a half ago.

The Court: I notice this is an old case. It was filed in 1950. Here we are, three years having gone by.

Mr. Fuhrman: I can explain that, your Honor. As I told you, we had a number of cases to file when this matter developed and I expected that the trial of one case would result in the issue being determined and we selected the Musco case and we tried that to a successful conclusion, and it took some time to bring that case on for trial. As a matter of fact, all of these cases were brought just within the applicable period of limitations, which is two years running from the date of delivery. And after the case did come on for trial before Judge Roche, negotiations were entered into with the defendant in this case and it was ultimately agreed by the defendant that he would resist the action.

The Court: What is happening now in the years that have gone by since? Are these still——

Mr. Fuhrman: The same tariff is in effect today. My understanding is that very few, if any, of these olives this type of olive, is being shipped at the present time. The shipper's contention is that the rate is too high for them. Recently negotiations were entered into with the railroad traffic department for the purpose of obtaining a lower rate, [116] which would suit the needs of these shippers on the Pacific Coast. It may be that some of these shippers are making shipment by water. I am not sure about that.

That concludes our case, your Honor. We will be glad to furnish a copy of the findings of fact and conclusions of law that Judge Roche handed down.

Mr. Picard: Primarily, as I understand it, even if the facts were the same, the judgment of Judge Roche would not be binding upon your Honor. If it had gone up on appeal and determined by the Court of Appeals, that would be a different matter. But, as I understand it, the determination of one judge of equal rank and standing would not be determinative upon another, particularly on a matter in which there may be a question of fact. Furthermore, the motion for summary judgment, which was made by the plaintiff in this action, was heard before Judge Roche and it was argued quite thoroughly and the facts that have been developed here were developed before Judge Roche by affidavit, and Judge Roche ruled that the facts were

different and therefore that his decision was not applicable.

The Court: The facts are different, if they are, of course the decision wouldn't be binding.

Mr. Picard: Not in any manner, and also, for whatever it may be worth, which I think would have just as much value, another similar case was filed in the Superior Court at [117] Woodland, and it was there determined in favor of the defendant and against the plaintiff Southern Pacific Company. Now if it was that company, or if it was not that company, it was some other.

Mr. Fuhrman: The Erie Railroad.

Mr. Picard: The Erie case. The same principles and everything else applicable to it. So, I think the matter really is before your Honor as a matter of first instance as far as this case is concerned.

Now I don't want to take up too much of your Honor's time. The hour is late already. My adversary took up a good deal of your Honor's time, but I do want to go into this a little because I think the argument that was made here is not very sound. First of all, I think their interpretation of this tariff is very wrong. I should think they would know better, if I am not mistaken—I don't want to accuse them of deliberately deceiving the Court, but it seems to me the matter has been presented to your Honor in such a way that it is not entirely fair. They have spoken of this only as being for canned goods. Now let us look on page 87 of the few pages they have given us here. It says "List of articles taking rates provided for 'canned goods,

pickles and preserves' in items making specific reference hereto."

Now take the next words: "Canned goods, pickles, preserves, in glass, earthenware or metal cans boxed, in [118] pails or tubs crated, or in bulk in barrels, except as otherwise provided."

Now, how can they contend that this means only "canned" when it deliberately says "in bulk, in barrels," and then it goes down and it uses the specific word "olives," your Honor—"olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

But if there could be any question whatever, if your Honor please, we come to the item upon which they place their great reliance here, on page 546, the third of the pages that they have, and we come to this heading of "Olives, salt-cured, not preserved in liquid, in waterproof barrels, boxes, kits or pails. Less carloads or in straight carloads."

Now let's go a little further down than that, your Honor, and it says: "Also mixed carloads of the following commodity with one or more of the following commodities"——

Mr. Fuhrman: Just a minute. Mixed carloads of the foregoing commodity"——

Mr. Picard: Isn't that what I said?

Mr. Fuhrman: No, you said "following."

Mr. Picard: Well, that is my mistake.

"Mixed carloads of the foregoing commodity with one or more of the following commodities." I thought that is what I said but maybe I didn't. All right. Now, the following commodities—take [119]

the last one and you have the exact words which appear in 3800:

> "Olives, canned or preserved in juice or in syrup or liquid other than alcoholic."

So your Honor can see that this whole thing absolutely applies to olives. It applies to the type of olives that are here in question and it isn't that this is a specific tariff which applies to olives and the other applies only to canned goods, because the other specifically says "in barrels" and here if you ship them in that same manner, in the same carload, with olives salt-cured, not preserved in liquid, the whole carload then gets the higher rate, according to this tariff.

So it is very clear, if your Honor please, that the two tariffs that are before your Honor and the only matter for your Honor to determine is which of the two tariffs is applicable. It is not a question of where this other applies only to canned goods and preserves, and I can't understand how an argument could be made——

Mr. Fuhrman: That isn't the contention, counsel.

Mr. Picard: All right. Now I have prepared some instructions for the jury, if your Honor please, and the first one I have is a definition of "preserve" which I made as a combination from the definition appearing in Webster's New International Dictionary and Funk and Wagnall's New Standard Dictionary. The word "preserve" is defined to mean to save from decomposition by curing

or treating with a preservative; [120] to save from decay; to prepare so as to resist decomposition or change, as to preserve fruit, or to save or keep from decay or corruption by means of some preservative; to keep in a sound state, as to preserve fruit.

And that, I submit, if your Honor please, is exactly what is before your Honor.

Now counsel has argued this matter and, with all due respect to your Honor, your Honor seems to have fallen into the idea that it is necessary for us to prove that we come within item 3800. I submit, if your Honor please, that the tariff which was charged by the plaintiff here was under 3800 and that the burden is upon the plaintiff to prove that it comes within 5670. And, furthermore, that if there is any question as to which of the descriptions is appropriate, even if the two descriptions are equally appropriate, the shipper is entitled to the lower rate.

I have authorities on both of those points, if your Honor desires them; the case of Sonken-Galamba Corporation versus Union Pacific Railroad Company, 145 Federal Second 808, holds that the plaintiff having accepted the shipment in question as of the character specified under item 3800 of its tariff and having assessed—I wouldn't say that that case covers the same thing.

I am reading now from the manner in which I put it—it might not cover ourselves, but similarly to it—under Section [121] 3800 of its tariff and having assessed and collected the transportation

charges based upon the rate specified for that classification, the burden is upon the plaintiff to show that at the time the olives were shipped they were of a character which called for a higher freight rate.

And even if we concede that the olives in question were included in more than one tariff designation, the defendant was entitled to select the designation which was the more specific, and that is held in United States versus Gulf Refining Company, 268 U.S. 542, and the DeRamus versus Mengel Company, 74 Federal Supplement 425——

Mr. Fuhrman: May I interrupt and ask if that case concerned olives? You were quoting, I thought, from a case, and you mentioned the word "olives."

Mr. Picard: Well, I am quoting from my own argument on it that I made before. I won't say specifically that that case does cover olives but I say that the language of it and the principle in that case is similar to this and I have simply used olives here because olives is the commodity here in question, without saying that those cases specifically covered olives. I don't contend that they did. I am simply giving the similarity here, your Honor.

And where the tariff descriptions are equally appropriate, the shipper is entitled to the lower rate, and that is held in American Railway Express Company versus Price Bros, 54 Federal [122] Second 67.

Also, your Honor is familiar with the authorities to the effect that the carrier's intention or construc-

tion is not what is applicable here. That ordinary language is to be applied.

So what we come to here, if your Honor please, is simply this, that in order that the plaintiff can prevail in their action it is necessary for the plaintiff to prove to your Honor by a preponderance of the evidence that the olives which were shipped here were salt-cured and not preserved in liquid.

Now, I take it, if your Honor please, that it cannot be fairly or reasonably contended that "preserved" means "preserved, immersed," The olives here were, as the testimony shows, for a certain length of time cured in salt. That had the effect of taking some of the moisture out of it but it did not take all of the moisture out of it. It took part of the moisture out, a certain percentage of the moisture. That was the purpose of it. And then after that was done, the olives were cleaned and washed; as nearly as it is possible the salt was taken out—at least from the exterior of the olive—without interfering with the effective work that may have been done by the salt on the interior. The olives were then put on a table, manipulated and a quantity of olive oil put on them, and they were all olive oil coated, and the testimony is, and there is no contradiction because the plaintiff's own experts said that that was done, to preserve the [123] olives; thereby, if your Honor please, the olives were preserved in liquid. They were then put in kegs, and the testimony is uncontradicted—there has been nobody here that has contradicted it otherwise, we have from the testimony, from the defend-

ant, the man who processed them, packed them and shipped them, and the man in New York received them and saw them after they were shipped in New York, and there was there in a 16 inch keg about, we will say, six inches of liquid—in other words, almost one third—more than one quarter. Mr. Panoi testified from one quarter to one third of the liquid. Now that liquid was in there for the purpose of preserving the olives and keeping them from getting moldy, and Mr. Paoni testified that if they had not been coated in olive oil so the liquid arose by a combination of the juice or moisture which came out of the olives themselves plus the olive oil, they would have become moldy, and, as he says, you shook or moved the barrel or turned the barrel so that the liquid which was in there would get on all of the olives and keep all of the olives moist and keep them from decaying.

Now, if that isn't preserving them in a liquid and if the purpose of that liquid is not preservation, I don't know what it could be.

I think, your Honor, obviously the tariff applies to the second jar of olives which we furnished here. The olives which were salt-cured and then shipped dry, not preserved in [124] liquid. And I think, if your Honor please——

The Court: You think that the tariff would apply to those?

Mr. Picard: The tariff would apply to the second type of olive, and that is all that it would apply to.

The Court: And it would not apply to these?

Mr. Picard: Would not apply to those.

The Court: Referring to Defendant's Exhibit A.

Mr. Picard: The lower rate of tariff applies to those which your Honor has in your hand. The higher tariff applies to these. They are a dry olive.

The Court: What would you say would be the reason for making that distinction?

Mr. Picard: We go back again, I take, to the fact that these olives, dry like they are, are very light. They are very light in weight and therefore you could probably send twice as many olives like this for the same weight that you could send a single quantity of those olives. Those olives are moist.

The Court: Don't you think there are as many olives in this jar as there are in that jar, in number of olives?

Mr. Picard: In number, yes, but in weight, no. In other words, that is a weight comparatively heavy—I don't know the theory—I didn't make the regulation, your Honor.

The Court: I would think that offhand that the reason, probably the reason for the distinction is that you have a [125] barrel of olives in brine, for example, that you are going to have less weight than if you have a barrel that is filled up entirely with olives, or would it be that way?

Mr. Picard: Well, I wouldn't think so, your Honor. I would think that the brine or the water possibly might be heavier than the olives.

value, then, that is involved?

Mr. Picard: We are just guessing, your Honor.

The Court: It isn't weight? Maybe it is the

The Court: There must be some reason for it.

Mr. Picard: You can obviously see these, if your Honor looks—well, look at these things. Just dry. I shouldn't think they weigh much more than a piece of paper. That, if your Honor please, unquestionably is the type of olives that come within a higher designation. There can't be any question of that.

The Court: They provide that these have to be in a water-tight container, too, don't they?

Mr. Fuhrman: I ask Mr. Picard if any of those so-called dry olives are shipped from California to eastern points?

Mr. Picard: I understand that they are.

Mr. Fuhrman: I wonder if it is a fact.

Mr. Picard: If it is agreeable, I will ask Mr. Krackov.

Are those shipped?

Mr. Krackov: They were shipped and are still being [126] shipped in Delevan, California. Dry olive—the dry olive type has been imported—we import some dry olives. They are packed in wooden cartons.

The Court: Well, the olives that are packed in brine, they develop a smooth surface do they?——

Mr. Picard: I would imagine.

The Court: ——when they are preserved in brnie, I suppose they develop a smooth surface that we are accustomed to.

Mr. Krackov: Just as they come from the store, they are stored in brine, preserved that way, canned, then packed that way.

The Court: What are these, these that I am holding in my hand now, the one that has been rubbed in oil—where are those disposed of in the market?

Mr. Krackov: They are sold to the Latin trade.

The Court: They are not sold to the restaurants or to the households, are they?

Mr. Krackov: To the housewife, yes, for the Italian and Spanish. They use that type.

The Court: They are not the fancy type that are smooth?

Mr. Krackov: No.

The Court: As we ordinarily see in the shelves in the grocery store and delicatessens?

Mr. Krackov: The black ripe olive, so-called ripe olives that are canned, are not really ripe. They are processed black [127] and processed and canned and called ripe olives. Those are smooth, the green olives are smooth.

Mr. Picard: I thought, if your Honor please, that counsel made an argument which was very apt in our favor and that was he asked where do you draw the line as to liquid? I think that is exactly right. As long as they are preserved in liquid. I don't think it makes any difference whether it is six inches or eight inches or twelve inches or a barrelful, as long as they are preserved in liquid.

I will concede that possibly if there is just about one inch or two inches at the bottom of the barrel that that might not be enough to act as a fair preservative. But where, as here, you have approximately six inches out of sixteen inches or almost

half, not too far from half a barrel, so that if your barrel is rolled over you probably have it up to about here, and as you roll it all of the olives become moistened, immersed—not immersed but moistened from it, and that preserves them and therefore they are preserved in liquid.

The Court: Well, of course, technically I think that that argument might be sound. The question is interpretation of the tariff here, that is the thing that they are talking about in the tariff. Don't we have to apply what we think the railroad company and the Interstate Commerce Commission was thinking of when, according to common sense interpretation, when they were using language? Do you think when they said that canned [128] or preserved in juice or in syrup or in liquid meant in olive oil that was rubbed with—rubbed on the olives and then put in a barrel?

Mr. Picard: And then the juice coming out afterwards, your Honor, in combination with the olive oil, forming the liquid.

The Court: I think maybe in a purely technical sense that as long as there is a drop of liquid on an olive—that it is sufficient that there be a drop of liquid on each olive, that it might be said that it would be in liquid to that extent. But don't we have to interpret the statute according to some common sense standards as to some distinction that is sought to be made? Isn't the distinction that they are making the difference between olives that have been preserved—in which the preservation process has been

by salt and then they are shipped, and the so-called brine or preservation method in which you will find the fluid or the material in a barrel or a can of liquid, and syrup or syrup that acts as a general preservative of the foodstuff? Isn't that the common sense distinction that they are making?

In one case they are talking about the olives which had been cured by salt. In this case, what do they do with olives cured by salt? They rub them with some olive oil. They put them into the barrel. Yes, that is helpful, that is helpful in making them look nice. It is helpful perhaps in preventing [129] any mold to develop on the outside of them. But is it the type of preservation that the framers of the tariff were speaking of when they were talking about something that was preserved in juice or syrup or liquid, canned or preserved in the juice? They were thinking of the ordinary type of canning or preserving in liquid or in juice.

Mr. Picard: I don't think so, your Honor. Primarily I think your Honor is confusing preserved with immersed. I don't think to preserve something in liquid it is necessary to immerse it in liquid, so long as the liquid does preserve it.

The Court: The primary method was the salt. That was the primary thing. That got the olive into shape so that it could be shipped without doing anything more to it.

Mr. Picard: Oh, no, your Honor. If that were done—that is why I offered to show your Honor——

The Court: How about the dry olives? I know

that is a different process. However, it is a salt process.

Mr. Picard: The salt is not washed off those.

The Court: Whether you wash it off or not, there is a preservation method by means of the salt that enables the olive, after it has gone through that process, to be shipped thereafter without anything more being done.

Mr. Picard: And that is the only thing that comes under 5670. [130]

The Court: Now there was that method. So that the essential, primary method of preserving the olive for shipment was the salt process, because if that wasn't so then it couldn't be shipped following that. The witnesses have so testified. So the primary preservation process was that of the salt.

Now I think offhand, and that's why I said to you that you had the greater burden, what they are talking about in the tariff here is the primary preservation method that is something in liquid and that that is the process by which the preservation is accomplished. I think that is the common-sense point of view. They wouldn't have put it in two ways, one, that in which olives which are salt-cured and not preserved in liquid, in waterproof barrels, boxes, kits or pails, as referred to; and the other in which olives which were canned or preserved in juice or in syrup or liquid other than alcoholic is referred to. So that you have two separate categories. One in which the tariff is particular to say that the olives are salt-cured and not preserved in liquid, in waterproof barrels, boxes, kits or pails,

and another classification in which the olives are canned or preserved in juice or in syrup or in liquid other than alcoholic. Those categories are in common sense mutually exclusive of one another, and under those circumstances it seems to me that that is why I thought that you had the laboring oar. And I don't know what was in Judge Roche's mind in deciding the other case. I didn't even [131] know about it until it was mentioned to me today. I haven't had an opportunity to speak to him about it. But I wouldn't be surprised, having lived together in brotherliness with him so many years, maybe our minds work the same way in the matter.

Mr. Picard: First of all, if your Honor please, I revert to the distinction which I made before, that it does not say here "immersed." It merely says "Preserved."

The Court: I didn't say that.

Mr. Picard: And as counsel very aptly asked, where do you draw the line? Just so long as there is liquid there which, when you roll it around in the barrel, preserves the olives.

The Court: I think the question, counsel, is what is the primary and fundamental preservative process.

Mr. Picard: I don't think it says that.

The Court: Apparently because one excludes the other. In one case it is, the preservation process is one which when you get through with it you don't have to do anything more with it. You can ship them just that way. Whereas in the other process

you ship them and pack them when they are still in the process of being preserved by that preservation process which has salt in it and that is the distinction. It is the common-sense distinction, where we see the barrels of brine, the bottles with the liquid in them, all the cans with the liquid in them and the food in them. There the preservative process is there by virtue of the liquid that is in them as distinguished [132] from what the tariff speaks of as an olive salt-cured and not preserved in liquid.

Mr. Picard: That means a dry olive, just as that Exhibit B is, your Honor, a purely dry olive. And then furthermore, if your Honor please, the tariff, the rating having been charged——

The Court: I agree with you in a technical sense, the adding of the oil to it is a process of preservation because the testimony shows that it has got something to do with preservation. But it is not the primary process and it is not the thing that the tariff is speaking of. There I think we have got to take the common-sense point of view; as the Court said in this Pennsylvania Crushing Company case, you don't dissect that language to find out when does a boiled egg become a hard-boiled egg as distinguished from a soft-boiled egg, for example, and have a lot of scientists take the witness stand and figure out the precise point of time or degrees of temperature. But we have to look at the way that the ordinary person regards a hard-boiled egg as distinguished from a non-hard-

boiled egg, and that is the way you have to look at these tariffs, I think.

Mr. Picard: There is nothing in there that I can see, with all due respect to your Honor, to support the statement which your Honor just made. It does not say anything about the primary preservative. The one of them that I think would [133] be applicable only to the type of olives in "B," olives salt-cured not preserved in liquid, those are dry olives shipped right in the salt that they were. Now these others, if your Honor please, after they have been in the salt for a certain length of time, not as long a time as the other type, are taken out and they are washed. Now, if they were shipped at that time, your Honor, without any oil being put on them or with them—I have samples here which I offered to show to your Honor to show that they become moldy and spoil, and their own chemist admitted that——

The Court: But that would—Oh, they wouldn't necessarily be spoiled.

Mr. Picard: If they became moldy.

The Court: I don't think that I am so naive to believe that there would be a big industry that would be shipping these olives in that form.

Mr. Picard: That's right.

The Court: Knowing that they would be spoiled.

Mr. Picard: That is why they don't ship them that way, your Honor.

The Court: They do ship them that way.

Mr. Picard: That is why they do preserve them in liquid and that is why they——

The Court: But they have shipped them and they do ship them the other way. [134]

Mr. Picard: No, your Honor. Those are shipped in salt.

The Court: They are shipped without olive oil, without being in——

Mr. Picard: Not after they are washed.

The Court: I don't think that industry would, having in the past now, if the result would be that they would all be spoiled.

Mr. Picard: Not washed.

If you took these and washed them, then you couldn't ship them.

The Court: But they are still dry.

Mr. Picard: You couldn't ship them, then.

The Court: I am talking about Plaintiff's Exhibit No. 1 there. Plaintiff's Exhibit No. 1 is being shipped, has been shipped, and I say I am not so naive as to believe that people engaged in that industry would ship them that way if they would become spoiled. Maybe they would develop a—Defendant's Exhibit B is what I meant to say.

Mr. Picard: They are not washed, your Honor.

The Court: Whether they are washed or not, they are certainly not in olive oil.

Mr. Picard: No. And——

The Court: I am not going to agree that people are going to be engaged in the industry of shipping these things if they are all going to get [135] spoiled.

Mr. Picard: Of course, they wouldn't, your Honor, and that is why they preserve them in oil.

That is the very purpose, when they wash them and wash the salt from them, they preserve them in oil. If they washed them, washed the salt from them and then shipped them, they would, as your Honor stated, all become spoiled, and that is why they are preserved in oil.

The Court: Well, of course, they look better and probably are better if you put them in oil.

Mr. Picard: The chemist admitted——

The Court: The fact that they look better that way doesn't mean they necessarily come under——

Mr. Picard: If your Honor will taste them you will find—I don't think there is—I have tasted both of them. I guess maybe those salt-cured ones might be all right for some people but I couldn't even eat one. They are absolutely bitter. While that is a good-tasting olive——

The Court: I guess they probably use them for cooking.

Mr. Picard: Something like that. If your Honor tastes one, your Honor can't eat it, but you can eat the other kind.

The Court: That may also be true but still it does not mean that these all become spoiled because they haven't been put in olive oil.

Mr. Picard: If the salt were washed from them, your Honor, if the salt were washed from them and then they were [136] shipped without being in the oil, they would become moldly and then spoil. You either have got to ship them as in "B" or No. 2 with the salt on them and not wash the salt from

them or if you do you have got to put the oil on them so that the oil forms a liquid in the keg and preserves them in liquid.

Now your Honor will remember this, that the lower rate has been charged by the railroad company; that the burden of proof is therefore upon the railroad company to establish the higher rate.

Your Honor has argued this as if it were necessary for us to prove that they were within 3800.

The Court: No, I don't say that. The burden of proof is upon the plaintiff to show which tariff is applicable.

Mr. Picard: Now, your Honor——

The Court: I don't think the burden of proof means too much.

Mr. Picard: If they came within either tariff, if the language is such that they could come within either tariff, we are entitled to the lower tariff.

The Court: I think that is right.

Mr. Picard: We are still entitled to the lower rate and certainly there is a liquid preserving them and there is a liquid in the barrel. So whether they are immersed or not, if your Honor please, I submit that certainly this is not the type of dry olive which is provided for in the tariff which [137] says salt-cured, not preserved in liquid. In other words, they would have to show that they are not preserved in liquid.

Now, when the oil is used to coat them and when they are in the barrel and a liquid forms in the barrel between the juice or brine from the olive itself, plus the oil, which covers about one-third of

the barrel or more, so that it moistens them all and preserves them, certainly they are preserved in liquid.

The Court: Mr. Picard, I must confess, I don't know what the reason for these differences in tariffs is. It is a subject with which I am not familiar. It is an administrative matter. The only problem is, the question of interpreting the tariff. Now it may be that in order to get that—when the olives are covered with this oil, that the seller gets a better price for them than where the salt is not washed off them and they are shipped that way and that there is greater value to the shipment. It may be that has something to do with the tariff. I don't know, I am not familiar with that. But tariff-wise I am doubtful as to whether or not just rubbing the olives with the oil, which enables the shipper to get a better price because of the extra work and material he used in that regard, would therefore entitle him to get a lower tariff rate which he could only get if he would ship it in the way that is customary in accordance with, according to orthodox standards as being a commodity that is preserved in [138] liquid, in the sense that it is ordinarily understood.

Mr. Picard: When you follow that, your Honor, with the fact that a liquid forms between the oil and the olive itself and that the keg is then about one-third filled with that liquid, so that that liquid does preserve the entire barrel, certainly, if your Honor please, even taking your Honor's most unfavorable to us reasoning, there is the doubt there,

and if there is any doubt we are entitled to the benefit of that doubt on the interpretation of the doubt to go down to the lower rate.

The Court: I think in a strict technical sense you could take a glass of olive oil and pour it into a barrel and there would be liquid in there. But I don't think that that is the common-sense interpretation of the meaning of the tariff. I think that the meaning of the tariff is the way people ordinarily regard the shipment of merchandise preserved in liquid. That means that merchandise is in liquid in the common accepted usage of the business and the trade and as we understand it, as we see the commodity preserved in liquid. I think that is what the tariff is talking about and that it is not required that there be a technical and scientific or quantitative analysis of the amount of liquid, and not to reach a point where in one instance it wouldn't be liquid and in another instance it would be. And you could carry out the doctrine to the ludicrous, to the extent that you could put a [139] teaspoon of the stuff in the barrel and there would still be liquid in there, so that an infinitesimal amount of the liquid could get on each one of the items of merchandise in the barrel. I am not just saying that to show that I don't think the determination of the question depends upon that kind of technical analysis of quantity of liquid. I think we are talking about—we are talking about the thing we are accustomed to thinking of and what they were thinking about when they wrote the

tariff, the ordinary everyday shipment of merchandise in barrels, bottles and cans, as it is shipped in a liquid, in which it can be kept indefinitely, without more ado, in a state of preservation, as in a bottle, a can, a barrel. My grandmother used to make pickles and they were in a barrel of brine. Well, they were good in that barrel of brine for a long time. You didn't have to do anything with them. The same thing applies to the bottle of olives, the can of olives that is on the shelf in the grocery store, the barrel in which they come, in the brine. That's what we speak of. It is not intended that—I don't think they were referring to taking a brush and putting olive oil on the olive and then putting it in the barrel, and then in order to get that liquid on the olive to keep it moving around over all of the olives and that periodically you would have to roll the barrel around or do something. I don't think that is the type of preservation in liquid that these tariff makers were referring to. They are talking about [140] everyday experience of shippers. The tariff was devised by reason of the experience that they have, what kind of merchandise there was to ship, how was it shipped. From that they fixed the tariff and the rates.

Mr. Picard: Isn't your Honor carrying it to the extreme when you hold it is necessary to be immersed?

The Court: I don't say immersed. I say that if they are talking about the barrel of liquid in which the preservation exists, in which the preservation

technically proceeds while the article is in it, is encompassed by the preserving liquid.

Now, if it was put in the separate compartment, in the bottom of the barrel, if there was liquid in the barrel, it wouldn't do any good——

Mr. Picard: Wouldn't the common-sense interpretation of it be sufficient liquid to preserve, not necessarily one teaspoonful like your Honor referred to, or complete immersion, but sufficient liquid to preserve?

The Court: I don't think that the tariffs could possibly—would be subject to that interpretation because there would have to be a chemist and a surveyor that would have to examine every shipment to examine whether or not there is a certain percentage of liquid. I think what they are going by here is just the ordinary common-sense business experience.

If you would go and take a survey of the man that runs the corner grocery store in hundreds of cities in the United [141] States and/or the shipper or the buyer of merchandise that is shipped, you would find that his answer would be the answer that I just gave. They don't make any technical distinctions. They see a bottle and it has got a preservative liquid in it and the commodity is in it. They see a can likewise, a barrel, and it is the same way, and that's the sort of thing that the tariff regulations sought to reach. Now it wasn't intended that you could get by and avoid that tariff regulation by putting a gallon or a quart of liquid in

a barrel and say, well, I have got some liquid in here and that satisfies this requirement.

Mr. Picard: The railroad itself gave it that interpretation for 25 years, your Honor, the interpretation——

The Court: I don't think the railroad gave that interpretation. It probably was impractical to understand that situation. That is why it was put on the bill of lading and the railroad company never questioned it until somebody came around and said, "This isn't right." That is the way those things are done. You don't think the freight agent up in Oshkosh or some place or other is going to go down and examine every barrel to find out whether or not or how much liquid there is in the barrel and so forth to see if it is as specified in the bill of lading or something else to indicate that it is not so. They accept the shipper's designation in most cases. [142]

Mr. Picard: The very thing they interpreted—"oil-cured olives" was on the bill of lading and that has been on all the bills of lading and it is just very recently that they first raised this point. Prior to that time they always accepted it under the tariff 3800.

The Court: I feel that I have given as much time to the discussion of the matter that I can. If there is anything else you want to file in writing on the matter, I will be glad to have it. My impression is that you would have to apply common sense, ordinary, everyday interpretation of these regulations such as in conformity with ordinary

business practices, in conformity with the experience in shipping merchandise. If that is what the tariff makers had in mind, that is the standard we have to apply, and that your attempt is to apply—to get a lower rate to something that is not in conformity with ordinary usage and ordinary commonsense definition of the meaning of the language of the tariff.

Mr. Picard: I would like opportunity to look up a little further on definitions, your Honor, and see if I can find anything that is more closely—more closely covers the point than just general argument that I have made.

The Court: Suppose within five days you submit some additional memorandum that you would like to file, and counsel have an opportunity to reply to that in five days.

Mr. Picard: Ten days instead of five? [143]

The Court: Very well. Ten days, and ten days to reply.

(Thereupon it was ordered the matter be submitted on memos, ten days and ten days—June 2, 1953, for submission.)

[Endorsed]: Filed September 30, 1953. [143-A]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE OF TRANSFER

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing documents, to wit:

Complaint,
Summons,
Motion to Dismiss,
Motion for Change of Venue,
Minute Order of April 24, 1950,
Minute Order of May 2, 1950,

are the original or certified copies filed in the above-entitled case.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Sacramento, California, this 2nd day of May, 1950.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys for the respective parties herein:

Clerk's certificate (Northern Division) on transfer of case.

Complaint for freight charges.

Summons.

Motion to dismiss, etc.

Motion for change of venue under Rule 12 (b).

Order submitting motion for change of venue, etc.

Order transferring case to Southern Division.

Answer.

Plaintiff's motion for summary judgment.

Affidavit of Amadeo Paoni in opposition to motion for summary judgment.

Affidavit of Robert E. Davis in opposition to motion for summary judgment.

Order denying motion for summary judgment.

Request for admissions.

Defendant's admissions.

Notice of motion to set aside submission and reopen trial.

Order denying motion to set aside submission, etc.

Order for judgment.

Findings of fact and conclusions of law.

Judgment.

Motion for new trial.

Order denying motion for new trial.

Notice of appeal.

Cost bond on appeal.

Appellant's designation of record on appeal.

Order extending time to file Appellee's designation.

Appellee's designation of record on appeal.

Deposition of Amadeo Paoni.

Reporter's transcript, May 11, 1953.

Plaintiff's Exhibits 1, 2 (for id.).

Defendant's Exhibits A, B, C (for id.) and D (for id.).

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court, this 12th day of October, 1953.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. M. TAYLOR,
Deputy Clerk.

[Endorsed]: No. 14078. United States Court of Appeals for the Ninth Circuit. West Coast Products Corporation, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 12, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14078

WEST COAST PRODUCTS CORP., a Corporation,

Appellant,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD FOR PRINTING

West Coast Products Corp., a corporation, the appellant in the above-entitled action, pursuant to Rule 19 (6) of the Rules of the above-entitled Court, hereby presents the following statement of the points upon which it intends to rely on this appeal. (The parties will be referred to by the same designations as they appeared in the District Court, i.e., appellant as plaintiff and appellee as defendant.)

The rendering of judgment in favor of the plaintiff and against the defendant is not justified by the record and is contrary to law upon the following grounds and for the following reasons, to wit:

I.

That the olives in question were preserved in

juice or liquid other than alcoholic and were not olives, salt-cured, not preserved in liquid.

II.

That the proper freight charge was that actually made by the plaintiff under Item 3800 of the Tariff in question, which prescribes no minimum amount of liquid but simply states "Olives, canned or preserved, in juice or in syrup, or liquid other than alcoholic."

III.

That the Trial Court erroneously concluded that Item 5670 of the Tariff was applicable and gave judgment to the plaintiff for additional freight charges on what it stated were undisputed facts.

IV.

That the Court of Appeals is not bound by the findings of the Trial Court on undisputed facts.

V.

That the defendant is bound only by a fair and reasonable construction of the Tariff.

VI.

That the burden was on the plaintiff to show that the olives were of a character which called for a higher freight rate, and the plaintiff failed to meet the burden.

VII.

That the olives being included in more than one tariff designation, the defendant was entitled to select the designation which was more specific; and that where two tariff descriptions are equally appropriate, the shipper is entitled to the lower rate.

Pursuant to the aforesaid rule said appellant West Coast Products Corp., demands the entire record, including all pleadings, as the record on appeal.

Dated at San Francisco, California, this 3rd day of December, 1953.

/s/ ALBERT PICARD,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed December 7, 1953.